93-418

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SOUTHERN TIMBER PURCHASERS COUNCIL,
HANKINS LUMBER COMPANY, INC.,
HOOD INDUSTRIES, INC. and
HUNT PLYWOOD COMPANY, INC.,
Petitioners,

v.

MARVIN C. MEIER, Acting Regional Forester, U.S. Forest Service; F. DALE ROBERTSON, Chief, U.S. Forest Service; JAMES W. PULLIAM, Regional Director, U.S. Fish and Wildlife Service; BRUCE BABBITT, Secretary of the Interior,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an action in district court under the Administrative Procedure Act challenging agency action which is claimed to violate statutory requirements, may constitutional standing be grounded on economic injury suffered in connection with an existing contract, notwithstanding that a claim for breach of that contract would fall within the exclusive jurisdiction of the Court of Federal Claims?

2. Do the forest products companies which regularly bid on and purchase timber for harvest in a national forest region have standing under Article III to challenge an agency decision reducing the amount of timber which the Forest Service has allotted for sale in that region?

PARTIES TO THE PROCEEDING BELOW

In the proceedings before the United States Court of Appeals for the Eleventh Circuit, the plaintiffs-appellants were Southern Timber Purchasers Council, Hankins Lumber Company, Inc., Hood Industries, Inc., and Hunt Plywood Company, Inc.* The defendants-appellees were two officials of the United States Forest Service within the Department of Agriculture (Regional Forester John E. Alcock and Forest Service Chief F. Dale Robertson) and two officials of the United States Department of the Interior (Secretary Manuel Lujan and U.S. Fish and Wildlife Service Regional Director James W. Pulliam). Pursuant to Rule 35.3, the current holders of these offices have been substituted in the petition caption.

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* Pursuant to Rule 29.1, Petitioners state as follows: The affiliates, including all parents and subsidiaries, of petitioner Hankins Lumber are Hankins Lumber Sales, Inc., Logging Industries, Inc., and Quality Exporters Foreign Sales Corp., Ltd. The affiliates, including all parents and subsidiaries, of petitioner Hood Industries are Atlas Roofing Corp., CLW, Inc., Hood Acquisition Corp., Longleaf Lodge, Ltd., Southern Bag Corp. (a Georgia corporation), and Southern Bag Corp., Ltd. (a Mississippi corporation). The affiliates, including all parents and subsidiaries, of petitioner Hunt Plywood are Hunt Canada, Inc., Hunt International, Inc., Llanfair, Inc., and Ruston Industrial Supplies, Inc.

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HANKINS LUMBER COMPANY, INC.,
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Petitioners,

v.

MARVIN C. MEIER, Acting Regional Forester, U.S. Forest Service; F. DALE ROBERTSON, Chief, U.S. Forest Service; JAMES W. PULLIAM, Regional Director, U.S. Fish and Wildlife Service; BRUCE BABBITT, Secretary of the Interior,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Southern Timber Purchasers Council, Hankins Lumber Company, Inc., Hood Industries, Inc., and Hunt Plywood Company, Inc., hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit dated June 21, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals, dated June 21, 1993, is reported at 993 F.2d 800 and is reprinted as Appendix A, App. 1a. The district court's April 23, 1990 decision addressing the motion to dismiss is reported at 736 F. Supp. 267 and is reprinted as Appendix E, App. 60a. Two additional district court opinions related to standing issues, each dated August 8, 1990, are unreported, and reprinted as Appendices C (App. 41a) and D (App. 51a). The district court's opinion on cross-motions for summary judgment (addressing the merits) is reported at 779 F. Supp. 1353, and is reprinted as Appendix B, App. 22a.

JURISDICTION

The decision of the Court of Appeals was rendered on June 21, 1993. This Court has jurisdiction over this matter by virtue of 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Administrative Procedure Act, in 5 U.S.C. § 702, provides in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof.

The Administrative Procedure Act, in 5 U.S.C. § 704, provides in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review.

Section 11(g)(1) of the Endangered Species Act, 16 U.S.C. § 1540(g)(1), provides in pertinent part:

> (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

> (A) to enjoin any person, including the United States and any other governmental entity . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof . . . .
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation[.]

The jurisdictional provision in 28 U.S.C. § 1346 provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of . . .
>
> > (2) Any other civil action or claim against the United States, . . . except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978.

The relevant portions of the United States Constitution, the Administrative Procedure Act, Contract Disputes Act, Endangered Species Act, National Environmental Policy Act, National Forest Management Act, 16 U.S.C. § 475, and 28 U.S.C. § 1346, as well as the relevant regulations, are reprinted as Appendix H, App. 107a.

STATEMENT OF THE CASE

Introduction

The court below held that forest products companies seeking to challenge a Forest Service policy which reduced the amount of timber they would be permitted to harvest under present and future contracts did not have

standing to maintain such a challenge. Both as respects current and future contracts, the decision of the court below squarely conflicts with decisions of other courts of appeals and upsets long-standing practice concerning the circumstances in which holders of federal contracts can maintain actions alleging statutory violations that affect existing contracts and prospects for future contracts. The decision below deprives businesses suffering clear economic injury of the ability to challenge agency actions that affect the core of their present and future business.

Statutory and Regulatory Background

In addition to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, three statutes are relevant to the underlying claims raised by Petitioners. The statutes are the National Forest Management Act ("NFMA"), the National Environmental Policy Act ("NEPA"), and the Endangered Species Act ("ESA").

National Forest Management Act—One of the fundamental purposes of the National Forest System is to "furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. § 475. Section 14 of the NFMA directs the Forest Service to provide timber through a timber sale process.[1]

The NFMA requires the Forest Service to establish a "land and resource management plan" ("forest plan") for each national forest, 16 U.S.C. § 1604, which establishes (among many other things) the expected timber sales level. Specifically, since "the Secretary shall assure that such plans . . . determine forest . . . harvesting levels," a forest plan must describe the timber sale level the agency intends to provide during plan implementation.

[1] Timber sales are held throughout the year in each national forest under sale conditions specified in advance. In general, private companies bid for the right to harvest a specific volume and type of timber in a particular area, and the highest bidder is awarded a timber contract. 16 U.S.C. § 472a; *see* 36 C.F.R. Part 223.

§ 1604(e)(2). This level is called the "sale schedule" quantity of timber. 36 C.F.R. §§ 219.3, 219.16. The planned volume of timber sales is to be set at a level "equal to or less than a quantity which can be removed . . . in perpetuity on a sustained yield basis," though "planned departures" are allowed. 16 U.S.C. § 1611(a). The agency strives to offer the sale level prescribed in the forest plan.[2] Once the public procedures required for forest planning (§ 1604(d)) have been completed and a forest plan has been adopted, all actions must be "consistent" with the forest plan (§ 1604(i)).

If any proposed action would not be consistent with the plan, a plan amendment must first be analyzed and formally adopted before the action can be taken. *See* 16 U.S.C. § 1604(f)(4); 36 C.F.R. §§ 219.10(f) and 219.12. If the plan amendment would be "significant," an environmental impact statement is required on the amendment and reasonable alternatives. *Id.*; *see generally* 779 F. Supp. at 1356-57 and 1363, App. 28a-29a and 40a.

Although the forest plan sets forth an anticipated volume of future timber sales, the sales themselves are designed later and sales are conducted in smaller, geographically specific, parcels. Before putting any given parcel out to bid or sale, the agency must follow additional procedures. The site-specific compliance with NEPA, ESA, and NFMA documentation and procedural requirements for a timber sale can take one to three years to complete. Thus, the Forest Service might not meet its timber sale target level due to these regulatory constraints and (as a fact of life) litigation over its decisions. *See generally* T. Lundquist, *Providing the Timber Supply from*

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[2] The "comprehensive plans address . . . approximately how much timber the Forest Service will permit to be harvested annually." 933 F.2d at 803, App. 3a. The planned volume of timber sales is set with the sustained yield constraint in mind. *See* C. Wilkinson and H. Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1, 174-82, 196-97 (1985).

National Forest Lands, 5 Nat. Res. & Env. 6, 9, 54 (Winter 1991).

National Environmental Policy Act—The Forest Service has duties under § 102 of NEPA, 42 U.S.C. § 4332. By regulation, each forest plan or significant plan amendment requires an environmental impact statement. 36 C.F.R. §§ 219.10(b) and (f), 219.12. A nonsignificant plan amendment only requires "the completion of an environmental assessment." 779 F. Supp. at 1357, App. 29a.

Endangered Species Act—Finally, the Forest Service has certain responsibilities under the Endangered Species Act, 16 U.S.C. §§ 1531-44. Under section 7 of the ESA, the Forest Service can only take actions (in this case, both planning and timber sales decisions) which are "not likely to jeopardize the continued existence of any endangered species"—a determination the agency makes in "consultation" with, and in response to a biological opinion prepared by, the U.S. Fish and Wildlife Service. 16 U.S.C. § 1536(a)(2).

The Regulatory Actions at Issue

The red-cockaded woodpecker (RCW or woodpecker) was listed as an endangered species in 1970. *See* 50 C.F.R. § 17.11(h). The woodpeckers inhabit open park-like pine stands in many of the forests in the Forest Service's Southern Region, Region 8. To fulfill its ESA responsibilities, Region 8 completed a wildlife handbook chapter (Handbook or Chapter) on its management program for these woodpeckers and engaged in formal consultation with the Fish and Wildlife Service in 1985. The Fish and Wildlife Service's biological opinion concluded that "complete implementation of the Chapter would satisfy the requirements of the Species Act." 993 F.2d at 803, App. 3a.

The Forest Service then "incorporated the Woodpecker Chapter into its forest plans." *Id.* Each forest plan also

included a "sale schedule" volume of timber to be offered for sale. The timber volume was determined after consideration of the Chapter and other environmental constraints on timber sales.

The issues presented here arose because the agency then did *not* fully implement the Handbook's and forest plans' measures, including mid-story removal of encroaching hardwoods, in national forests in Texas (*see Sierra Club v. Yeutter*, 926 F.2d 429, 438 (5th Cir. 1991)) and elsewhere. Count I of Petitioners' Complaint alleges that the failure to fully implement the Handbook measures violates ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

The Forest Service also "received eight letters from the Sierra Club Legal Defense Fund threatening citizen suits under the [ESA] if the Forest Service continued its 'inadequate management practices' for protecting the Woodpecker." 993 F.2d at 803, App. 4a. The agency's response was the summary adoption of a new "Policy On Cutting Within ¾ Mile Of RCW Colonies On Existing Timber Sale Contracts, March 27, 1989" (Policy, Appendix G, App. 97a). *Id.* The new Policy and its summary adoption—effectively amending forest plans without any of the attendant findings or requirements—were the subject of Counts II-IV of Petitioners' Complaint. Specifically, Petitioners alleged that the Policy had been implemented without the: (1) prior consultation with the Fish and Wildlife Service required by ESA § 7(a)(2); (2) prior preparation of an environmental assessment or environmental impact statement as required by NEPA; and (3) prior analysis of whether the Policy was "consistent" with the forest plans or whether the forest plans first had to be amended, as required by the NFMA.

The new Policy created additional restrictions on timber harvesting beyond the restrictions in the 1985 Handbook. It "strictly limited the permissible methods for timber harvesting in those areas within ¾ miles of a Woodpecker colony." 993 F.2d at 803, App. 4a. The

Policy was made "applicable to all awarded and pending timber contracts, advertised timber sales, and proposed timber sales." *Id.* In its Answer, the government admitted that the Policy required the modification of 50 existing contracts and would reduce the timber sale levels in fiscal years 1989 and 1990 (the "future contracts") from the targets originally prescribed in forest plans by 17 million board-feet (MMBF) and 56 MMBF respectively. *Compare* Complaint ¶ 18 *with* Answer ¶ 18.[3]

Parties

Petitioners Hankins Lumber Company, Inc., Hood Industries, Inc., and Hunt Plywood Company, Inc., each held at least one contract to harvest timber in national forests within Region 8. Under each of those contracts, the volume of timber which the company was allowed to harvest was reduced (and the economics of the harvest were changed) due to the Forest Service's adoption of the new Policy. 993 F.2d at 803, App. 4a-5a. The changes were made pursuant to provisions of the contracts which granted the Forest Service the right to "cancel or unilaterally modify the contract 'if the protection measures [for the RCW] prove inadequate.'" *See* 993 F.2d at 803-04, App. 5a. The individual company petitioners were joined by petitioner Southern Timber Purchasers Council, the trade association representing more than 60 purchasers of national forest timber in the Forest Service's Region 8.[4]

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[3] The administrative record filed by the Forest Service (in document 18) set forth the conclusion that the challenged Policy reduced the harvest level on existing timber contracts by 27.128 MMBF. Overall, the Policy reduced the planned timber sale level by 100 MMBF.

[4] When the Complaint was filed in 1989, the Council's name was the Region 8 Forest Service Timber Purchasers Council. The district court was informed of the Council's name change in 1991 and the district court changed the caption of the case to reflect the new name. For some reason, the Eleventh Circuit's caption uses the Council's old name.

The named defendants included the Forest Service official who signed the challenged Policy (Regional Forester Alcock, now Mr. Meier) and Forest Service Chief Robertson. Since the suit also alleged that the Fish and Wildlife Service had violated its obligations under the Endangered Species Act, the named defendants also included the agency's Regional Director (Mr. Pulliam) and the person the Endangered Species Act charges with consultation responsibilities, the Secretary of the Interior (then Secretary Lujan, currently Secretary Babbitt).

District Court Proceedings

On December 7, 1989, Petitioners filed a four-Count Complaint in the United States District Court for the Northern District of Georgia. The Complaint sought to set aside the Policy under the APA and to enjoin the Forest Service to fully implement the Handbook under the ESA citizen suit provision. Jurisdiction was grounded on the existence of a federal question under 28 U.S.C. § 1331 and the ESA citizen suit provision (16 U.S.C. § 1540(g)).

Defendants moved to dismiss on various grounds, citing, *inter alia*, an alleged lack of standing on the part of Petitioners to maintain the NEPA and ESA claims under the prudential "zone of interests" analysis.[5] The district court granted the motion in substantial part, dismissing the NEPA claims (*see* App. 45a-49a, App. 65a-67a) and the ESA claims primarily on standing grounds. *See* App. 53a-56a, 67a-70a. Defendants did not challenge Petitioners' standing to maintain the claims asserted under the

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[5] Defendants also asserted that Petitioners' claims fell within the exclusive jurisdiction of the Court of Federal Claims. The district court noted that the "way they are pled, Plaintiffs' claims are not subject to the exclusive jurisdiction of the Claims Court," since they "assert statutory causes of action and seek remedies that are separate from any potential contract claims." App. 63a.

National Forest Management Act.[6] Considering those claims on the merits, the district court ultimately granted summary judgment to defendants. App. 22a. Petitioners appealed.

The Court of Appeals' Decision

A panel of the United States Court of Appeals for the Eleventh Circuit held that Petitioners—the companies which contracted to harvest timber in the Region 8 forests—lacked standing to maintain any of their claims. The district court had been primarily concerned with the second prong of the standing inquiry, the statute-specific, "zone of interests" aspect of standing. The court of appeals, in contrast, grounded its decision squarely on *constitutional* doctrine—the perceived absence of redressable "injury-in-fact under Article III"[7] that could ground a district court suit. 993 F.2d at 804-11, App. 6a-20a.

As to the increased logging costs and reduction in the timber Petitioners would be allowed to harvest under their existing contracts, the panel noted that if the Petitioners had sought *contractual* relief (*i.e.*, brought claims for breach of contract), such claims would have fallen within the exclusive jurisdiction of the Court of Federal Claims

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[6] The district court rejected the argument that the case had become moot by virtue of the further adoption of a "new woodpecker policy." The district court noted that Plaintiffs had alleged that the successor policy suffered from the same defects as the prior Policy and that the successor policy "has thus not eradicated Plaintiffs' harm." App. 58a. The court concluded that "Defendants cannot evade review by continuously adopting short term woodpecker plans." *Id.* The government did not reassert mootness in the Court of Appeals.

[7] In holding that the timber companies were without standing to maintain the action, the court below *sua sponte* raised a question about Petitioners' standing to maintain the National Forest Management Act claims. 993 F.2d at 807 n.9, App. 12a. The Forest Service had not questioned Petitioners' standing to maintain its claims under the NFMA.

as claims "founded upon any express or implied contract," 28 U.S.C. § 1346. Although Petitioners had raised only *statutory* claims (which, under the APA, were squarely within the district court's jurisdiction), the court held that Petitioners could not ground their standing in the district court upon "contractual injuries." 993 F.2d at 808, App. 13a-14a.

With respect to the reduction of the amount of timber to be made available for future purchase in these forests (specifically, the reduction of 17 MMBF in 1989 and 56 MMBF in 1990), the court found that this "injury fails" because (1) the NFMA does not confer any "right on the Timber Companies to harvest a set amount of timber each year," and (2) actual timber sales are made in specific parcels, after site-specific decisionmaking, which (in the court's view) rendered Petitioners' interest "purely speculative." 993 F.2d at 808-09, App. 15a.[8]

REASONS FOR GRANTING THE WRIT

I. WHETHER FEDERAL CONTRACTORS MAY GROUND STANDING TO PURSUE DISTRICT COURT ACTIONS RAISING STATUTORY CLAIMS UNDER THE ADMINISTRATIVE PROCEDURE ACT ON INJURIES SUFFERED IN CONNECTION WITH THEIR CONTRACTS IS AN IMPORTANT, RECURRING QUESTION UPON WHICH THERE IS A MANIFEST CONFLICT IN THE CIRCUITS

The court of appeals panel reasoned that because a claim founded upon a contract with the federal government would be within the exclusive jurisdiction of the Court of Federal Claims under 28 U.S.C. § 1346 (the

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[8] The panel also held that Petitioners lacked standing based on their "quality of life" and environmental injuries. 993 F.2d at 809-11, App. 16a-20a. The court found that these injuries were attenuated versions of the same economic injuries the court thought it could not consider directly, or else were injuries to the companies' employees rather than to the companies themselves.

Tucker Act), Petitioners could not rely on economic injuries experienced in connection with the performance of those contracts to ground an action in the district court under the Administrative Procedure Act seeking to set aside agency action as unlawful. The effect of the decision is, of course, to deprive companies suffering direct economic injury as a result of an agency's violation of law of the presumptive right under the APA to set aside the agency's unlawful action.

As described below, the decision of the Eleventh Circuit is in direct conflict with the decisions of several circuits which have squarely held that APA actions alleging statutory violations which *affect* contracts with the federal government may be brought in the district court, even though a claim of *breach* of such a contract (if there existed a viable claim of breach) would fall within the exclusive jurisdiction of the Court of Federal Claims.[9]

The court below seems to have collapsed two separate questions—the question of standing, and that of the exclusive jurisdiction of the Court of Federal Claims—into one. That has not been the approach employed by other circuits; the questions are conceptually separate.

The first question, that of standing under Article III, is whether the plaintiff has suffered a discrete, palpable and redressable injury as a consequence of defendants' actions.

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[9] *See Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 610 (D.C. Cir. 1992); *Wabash Valley Power Ass'n v. Rural Electrification Administration*, 903 F.2d 445, 452 (7th Cir. 1990); *Diamond Shamrock Exploration Co. v. Hodel*, 853 F.2d 1159, 1168 (5th Cir. 1988); *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1486 (9th Cir. 1985); *Tennessee v. Dole*, 749 F.2d 331, 334-36 (6th Cir. 1984); *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 969 (D.C. Cir. 1982); *see also Vandervelde v. Yeutter*, 774 F. Supp. 645, 648-49 (D.D.C. 1991). Indeed, the courts have held that such suits can be maintained in the district court even when they would be determinative of any follow-on suit to collect monetary damages and raising a contract claim—which would, of course, have to be pursued in the Court of Federal Claims. *See Hahn v. United States*, 757 F.2d 581, 589 (3d Cir. 1985).

See Lujan v. Defenders of Wildlife, —— U.S. ——, ——, 112 S. Ct. 2130, 2136 (1992). Here, Petitioners had clearly suffered redressable injury-in-fact in connection with their contracts. The challenged Policy reduced the "available timber under the contracts" and "increased logging costs under the contracts." 993 F.2d at 807, App. 13a. Those injuries would be redressed by setting aside the agency action. Specifically, the contracts had set forth a quantity of timber which the particular company could harvest, which was reduced as a result of the adoption of the new Policy.[10] In addition, the Policy affected the particular location of the timber and density of harvestable timber in a given area, which in turn affected the costs of the harvest and the profitability of the contracts.

The answer to the second question, that of jurisdiction of the district court, turns on the nature of the claim (breach of contract or statutory) and the remedy being sought (monetary or equitable). *See Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982), and cases cited in note 9, *supra*.[11] Here, the statutory claims Peti-

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[10] Each of the "contracts included an endangered species provision which permitted the Forest Service to cancel or unilaterally modify the contracts 'if the protection measures prove inadequate.'" 993 F.2d at 804, App. 4a-5a. If the government invokes the clause, the government is required to try to *mitigate* the effect on the contractor and agree with the contractor on a modification to do so—as the parties eventually agreed upon here. *Id.*

[11] "'[D]isguised' contract claims cannot be brought in the district court" in the guise of APA claims, but where the district court claim alleges the violation of a statute and seeks injunctive relief, the action may be maintained in the district court under the APA. *Megapulse*, 672 F.2d at 968; *see* cases cited in n.9, *supra*. Whether an action is within the exclusive jurisdiction of the Court of Federal Claims is to be determined by the rights asserted and remedies sought. Notwithstanding a possible parallel, contractual remedy, the cases hold that there is no bar to district court suit where "the government defendants are charged with having acted beyond the scope of their statutory authority." *Id.*

tioners asserted under the APA were concededly *not* breach of contract claims, and the relief Petitioners sought was injunctive, rather than monetary. As both courts below recognized, as such those claims were *not* within the Court of Federal Claims' exclusive jurisdiction. That ought to have ended the inquiry, and would have in most other circuits.

By collapsing the two questions, the court below concluded that injury suffered in connection with a federal contract (what the court called a "contractual injury") could *not* ground standing in the district court, a result not justified by the answer to either question considered alone. In every case, the decision would deprive the contractor of the remedy which the APA prescribes: to "set aside" unlawful agency action.[12] In many cases, it would deprive the contractor of any remedy at all. That is because an unlawful action may injure a contractor in connection with a contract (causing "contractual injury") without giving rise to a claim of breach.

For example, the unlawful adoption of a regulation might increase a contractor's cost of performing a contract. Or, the adoption of an unlawful regulation might affect the government's needs under a requirements contract, or its ability to supply under a supply contract—with an obvious effect on the potential profits of the company which contracted with the government. The economic effect on the contract in any of these situations would be clear, as would be the presumptive right to bring

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[12] 5 U.S.C. § 706. The court below did *not* suggest that the Court of Federal Claims was the exclusive forum, or even a possible forum, in which Petitioners could press their APA claims seeking injunctive and declaratory relief. This Court has long held that the Court of Federal Claims does not have the authority to grant equitable or declaratory relief of the kind that the Administrative Procedure Act, 5 U.S.C. § 706, provides as a remedy. *Bowen v. Massachusetts*, 487 U.S. 879, 905-07 (1988). *See also Hahn v. United States*, 757 F.2d 581, 586 (3d Cir. 1985). The more important issue is, of course, what claims are within the *exclusive* jurisdiction of that court. *See Tennessee v. Dole*, 749 F.2d 331, 335 (6th Cir. 1989).

an action under the APA to set aside the unlawful agency action causing the harm. But that would not necessarily mean that there existed a valid basis upon which to claim breach of contract—the allegation needed to bring the claim within the exclusive jurisdiction of the Court of Federal Claims.[13]

Thus, other courts of appeals have treated the issue whether plaintiff's grievance is associated with a contract with the federal government as distinct from the question whether an action may be maintained in the district court under the APA. This is the rule applied in other circuits even if plaintiff's interest in the case is plainly tied to the effect of the unlawful agency action on the existing contract. The court below acknowledged that its approach was facially in conflict with the decision of the Tenth Circuit in *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971),[14] which held that companies with

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[13] The court below also cited to the Contract Disputes Act, 41 U.S.C. §§ 601-13, App. 137a. But it is unclear what this adds to the analysis since the CDA merely provides for mandatory review of contractual claims by the contracting officer, with appeal to agency boards of contract appeals and the Court of Federal Claims. No one has suggested that a contractor must bring to a contracting officer and agency boards of contract appeals the kinds of APA, ESA, NEPA, and NFMA claims at issue in this case, or that they could provide equivalent relief. Moreover, the issue whether a matter is within the exclusive jurisdiction of the Court of Federal Claims turns on whether the claim is "founded" on a contract, 28 U.S.C. § 1346, not whether the contract is itself subject to the Contract Disputes Act.

[14] In an effort to distinguish that case, the court below speculated that it was at least "possible that the plaintiff in *National Helium* suffered a non-contractual injury," but held that to "the extent that *National Helium* supports the notion that an injury arising out of a government contract will support a non-contract action, we disagree." 993 F.2d 808 n.11, App. 14a. In fact, the *National Helium* court made clear that the injury with which it was concerned was the injury experienced by the plaintiffs under their contracts. *See* 455 F.2d at 654, *aff'g National Helium Corp. v. Morton*, 326 F. Supp. 151, 156-57 (D. Kan. 1971).

"a genuine substantial interest in the termination" of their contracts have standing to maintain a NEPA challenge despite the existence of a contractual "remedy under the Tucker Act in the Court of Claims [which] could arguably at least be adequate." 455 F.2d at 653-54.

The decision below is also in direct conflict with decisions from at least five other circuits which have similarly allowed contractors to maintain statutory challenges under the APA in the district court where standing was plainly based on injuries suffered in connection with a contract, claims for breach of which would have to be pursued in the Court of Federal Claims. *E.g., Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 610 (D.C. Cir. 1992) ("litigants may bring statutory and constitutional claims in federal district court even when the claims depend on the existence and terms of a contract with the government"); *Wabash Valley Power Ass'n v. Rural Electrification Administration*, 903 F.2d 445, 452 (7th Cir. 1990) (district court jurisdiction over claim that contracting agency's action was unlawful because the "relief is not grounded in contract"); *Diamond Shamrock Exploration Co. v. Hodel*, 853 F.2d 1159, 1168 (5th Cir. 1988) (court could decide legality of royalty in federal mineral lease and transfer to Claims Court for any monetary refund owed to lessee); *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1486 (9th Cir. 1985), *cert. denied*, 474 U.S. 931 (1985) and *sub nom. Bohemia, Inc. v. Block*, 474 U.S. 919 (1985) (district court jurisdiction over timber contractor's statutory claim under the precursor to the NFMA, the Multiple-Use Sustained-Yield Act, but not the contract claim for equitable relief); *Tennessee v. Dole*, 749 F.2d 331, 334-36 (6th Cir. 1984) ("Court of Claims does not have exclusive jurisdiction over suit merely because it raises contract related issues"); *see also Vandervelde v. Yeutter*, 774 F. Supp. 645, 648-49 (D.D.C. 1991). In each of these cases, plaintiff's interest in the controversy and in-

jury arose out of (and in connection with) its federal contract.

Each of these cases carefully examined the relationship between the district court's and the Court of Federal Claims' respective jurisdictions over contract-related, statutory-based APA claims. Yet none of these cases discerned any problem of Article III standing of the kind which the Eleventh Circuit cited here. If the Eleventh Circuit were correct in positing a defect in Petitioners' Article III standing in this case, however, those courts would have been precluded in each instance from considering plaintiffs' claims on the merits.

Indeed, the Eleventh Circuit's decision here appears to conflict with this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879, 902-05 (1988). In *Bowen*, this Court considered the relationship between the right to maintain a district court action under the APA, and the jurisdiction of the Claims Court over related issues. The government argued that Section 704 of the APA [15] "should be construed to bar review of the agency action in the District Court because monetary relief against the United States is available in the Claims Court under the Tucker Act." *Id.* at 904. Describing that argument as a "restrictive—and unprecedented—interpretation of § 704," the Court held that "the remedy available . . . in the Claims Court is plainly not the kind of 'special and adequate review procedure' that will oust a district court of its normal jurisdiction under the APA." *Id.* If the opinion below were correct, it is difficult to see how this Court could have vindicated the district court's jurisdiction in *Bowen* without addressing the fundamental issue of standing.

The decision of the court below is thus in conflict with the decisions of the courts of appeals of several circuits

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[15] "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in a court are subject to judicial review." 487 U.S. at 902 n.32, quoting 5 U.S.C. § 704.

and upsets settled practice concerning the assigned jurisdiction of the district courts and the Court of Federal Claims. The number of reported cases addressing these issues over the years confirms that this is an area of recurring concern. The constitutional and jurisdictional rule adopted by the Eleventh Circuit panel—barring companies suffering immediate economic injury from challenging the agency action that produces the injury—is itself sufficiently unsettling to require the intervention of this Court.

II. THE DETERMINATION THAT PROSPECTIVE PURCHASERS OF TIMBER HAVE NO STANDING TO CHALLENGE UNLAWFUL DECISIONS TO RESTRICT THE AMOUNT OF TIMBER MADE AVAILABLE FOR FUTURE PURCHASE IS IN DIRECT CONFLICT WITH A DECISION OF THE NINTH CIRCUIT WHICH ALLOWED STANDING IN THE SAME CIRCUMSTANCE

After rejecting the direct effect of the agency's actions on Petitioners' existing contracts as a basis for standing, the court below turned to the effect of the unlawful Policy in limiting the quantity of timber that the Forest Service would make available for sale to them in the future.

1. With respect to the Eleventh Circuit's reasoning that "this injury fails [because] no right is conferred on the Timber companies to harvest a set amount of timber each year . . . [or] to compel the Forest Service to sell any future timber to them" (993 F.2d at 808, App. 15a), it suffices that this Court has never deemed the existence of such an independent "right" to be dispositive.[16] Injury-in-fact is primarily a factual determination. Whether or

[16] The Eleventh Circuit's suggestion that one must have a substantive "right" to a result in order to have standing is inconsistent with the APA, *see Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 394 (1987), and confuses standing with the merits. *See Ass'n of Data Proceessing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

not Petitioners have a "right" to compel the Forest Service to sell them any timber, the standing inquiry under Article III ought to turn on the question whether, as a factual matter, the court's decision is likely to bring them relief. The issue is whether the plaintiff can demonstrate "a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury . . . ." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 433 U.S. 59, 79 (1978). That factual likelihood was present here, as the Forest Service conceded in its Answer that the adoption of the Policy resulted in a reduction of the timber allocated for sale by 17 MMBF in 1989 and 56 MMBF in 1990. *See* note 3, *supra* and accompanying text.

2. The statement of the court below that it was "purely speculative" whether setting aside the Policy "would result in greater timber availability in the future," 993 F.2d at 808, App. 15a, was *not* based upon a *factual* finding or conclusion about the relationship between the adoption of the new Policy and the ultimate sales of timber. Instead, it was based on a legal conclusion premised on the fact that actual sales would be made in smaller parcels after additional site-specific analysis.[17]

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[17] The court cited *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), as a case in which standing was denied where redress depended upon "the unfettered choices made by independent actors not before the courts . . . ." 993 F.2d at 808, App. 16a. But this Court has made clear that the essence of *ASARCO* is whether redress depends on the actions of *independent third parties*. *See Lujan v. Defenders of Wildlife*, —— U.S. ——, ——, 112 S. Ct. 2130, 2137 (1992). The only actions at issue were those of the Forest Service defendants. As the Court has explained, where, as here, "the plaintiff is himself an object of the action (or forgone action) at issue," *id.*, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." 112 S. Ct. at 2137. The standing inquiry turns not on the presence of intervening events, but on a factual determination of how probable the links in the causal chain will be. *See Public Citizen v. FTC*, 869 F.2d 1541, 1547 n.9 (D.C. Cir. 1989);

The decision of the Eleventh Circuit is in direct conflict with that of the Ninth Circuit in *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1515-16 (9th Cir. 1992), which addressed the same arguments, in the context of the same NFMA statutory scheme. In *Idaho Conservation League*, the Ninth Circuit rejected the precise argument the Eleventh Circuit adopted here: that because the "concrete effect [of the initial forest plan decision concerning the amount of timber that would be made available for sale] might be seriously mitigated at the site-specific, project level," the plaintiff did not have standing to challenge decisions which affected the timber sale level in the forest plan. *Id.* at 1516.

The only obvious difference between the two cases is that the Ninth Circuit case involved apparently sympathetic environmental groups, while the Eleventh Circuit case involves seemingly less sympathetic forest products companies. That distinction ought to make no difference under Article III.

The decision of the court below creates a constitutional rule that effectively deprives the forest products companies that harvest timber in national forests of the ability to challenge agency violations of law that directly affect their future business, specifically, basic decisions about how much timber the Forest Service will allow to be harvested.[18] But beyond the effect on this industry, the

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National Wildlife Federation v. Hodel, 839 F.2d 694, 705 (D.C. Cir. 1988) ("concerned here not with the length of the chain of causation but [with] the plausibility of each of the links that comprise the chain").

[18] The court below also rejected Petitioners' other interests as a basis for standing. Forest products companies have a long-term interest in active woodpecker protection because they are likely to obtain the future contracts to thin the forest and remove mid-story hardwood, thereby creating the park-like pine habitats preferred by woodpeckers. *See* App. 42a. The court below rejected this basis for Article III standing on the ground that it was merely an attenuated version of future economic injuries, which would not

standing of prospective government contractors to complain of regulatory decisions which determine an agency's future contracting intentions has been a recurring issue. Other circuits have long recognized the standing of a potential supplier to complain, for example, of an unlawful decision to reduce the government's purchases of that product, *Ballerina Pen Company v. Kunzig*, 433 F.2d 1204, 1205-06 (D.C. Cir. 1970)—an approach facially inconsistent with the approach of the Eleventh Circuit in this case. And just last Term, in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, —— U.S. ——, 113 S. Ct. 2297 (1993), this Court touched on a similar issue in a rather special context.[19] The Court overturned a decision

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satisfy the requirements of Article III. 993 F.2d at 809 n.14, App. 17a.

This is at least facially inconsistent with the considerable case law that economically-motivated environmental interests are sufficient to confer standing to argue the lack of NEPA compliance. *E.g., Realty Income Trust v. Eckerd*, 564 F.2d 447, 452 (D.C. Cir. 1977) ("a party is not 'disqualified' from asserting a legal claim under NEPA because the 'impetus' behind the NEPA claim may be economic"); *Robinson v. Knebel*, 550 F.2d 422, 424-25 (8th Cir. 1977); *Cady v. Morton*, 527 F.2d 786, 791 (9th Cir. 1975); *National Helium Corp. v. Morton*, 455 F.2d 650, 655 (10th Cir. 1971) (a company with an economic stake in the outcome is "not disqualified from seeking to advance [an environmental] interest. No group has a monopoly on working for the public good"); *County of Josephine v. Watt*, 539 F. Supp. 696, 704 (N.D. Cal. 1982) (forest products industry has NEPA standing); *Duke City Lumber Co. v. Butz*, 382 F. Supp. 362, 373-74 n.35 (D.D.C. 1974) (same). These cases focus primarily on the prudential "zone of interests" test for standing, but they necessarily found that the predicate constitutional requirements—at issue in this petition—were satisfied as well.

[19] The issue arises in related settings as well. For example, the courts have repeatedly recognized the standing of a disappointed bidder on a federal contract to bring a suit complaining of the award to another bidder (*e.g., Choctaw Mfg. Co., Inc. v. United States*, 761 F.2d 609, 615-16 (11th Cir. 1985); *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970)). And they have found standing on the part of an applicant for a coal prospect-

of the Eleventh Circuit which had held that prospective bidders on state contracts did not have standing to challenge a set aside program without showing that, absent the set aside, they would have received a contract. Though the holding of that case may not be controlling here, it serves to demonstrate the difficulties which some lower courts have had addressing the concept of standing in this setting.

* * * *

The circuit court seemed intent on discovering grounds on which to deny the forest products company Petitioners standing to present their claims on the merits. In denying them standing to challenge a policy reducing the amount of timber which the Forest Service would allow them to harvest, the court below advanced constitutional and jurisdictional principles that squarely conflict with the decisions of other courts of appeal. The effect of the decision is to deny government contractors and prospective government contractors standing to challenge agency decisions directly affecting their business in a wide variety of cases. On one issue (the standing of holders of current government contracts to maintain an action in the district court under the APA based upon the injury suffered in connection with contracts), the decision of the court below conflicts with those of several other circuits, and undermines settled law concerning the allocation of jurisdiction between the Court of Federal Claims and the district courts. On another issue, the decision is in direct conflict with a decision of the Ninth Circuit, which found Article III standing in virtually identical circumstances, under the same statutory scheme, for more sympathetic defendants —environmental groups rather than forest products companies. The issues presented by this petition are of significant practical and legal concern.

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ing permit to challenge NEPA compliance in connection with a generalized decision no longer to issue such permits (*Krueger v. Morton*, 539 F.2d 235, 237-38 (D.C. Cir. 1976)).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-8892

REGION 8 FOREST SERVICE TIMBER PURCHASERS COUNCIL, HANKINS LUMBER COMPANY, INC., HOOD INDUSTRIES, INC., HUNT PLYWOOD COMPANY, INC., SOUTHERN TIMBER PURCHASERS COUNCIL,

Plaintiffs-Appellants,

v.

JOHN E. ALCOCK, in his Official Capacity as Regional Forester for Region 8 of the U.S. Forest Service; F. DALE ROBERTSON, in his Official Capacity as Chief of the U.S. Forest Service; JAMES W. PULLIAM, JR., in his Official Capacity as Regional Director of Region 4 of the U.S. Fish and Wildlife Service; MANUEL LUJAN, in his Official Capacity as Secretary of the U.S. Department of the Interior,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

June 21, 1993

Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and JOHNSON, Senior Circuit Judge.

JOHNSON, Senior Circuit Judge:

This case centers on actions taken by the United States Forest Service to protect the red-cockaded woodpecker (the "Woodpecker") in the Southern Region (formerly Region 8) of the National Forest System. The Southern Timber Purchasers Council (formerly Region 8 Forest Service Timber Purchasers Council) (the "Council") is an affiliation of purchasers of national forest timber in the Southern Region. Hankins Lumber Co., Inc., Hood Industries, Inc., and Hunt Plywood Co., Inc., (the "Timber Companies") are members of the Council, and had contracts with the Forest Service to cut timber in national forests in the Southern Region. Together, these parties brought suit against the Secretary of the Interior, as well as various officials of the Forest Service and the Fish and Wildlife Service (collectively, the "Government"), challenging actions taken by the Forest Service to protect the Woodpecker. They now appeal the district court's orders (1) dismissing their claim under the National Environmental Policy Act ("NEPA") for lack of standing, (2) entering summary judgment for the Government on their claims under the Endangered Species Act (the "Species Act") for lack of standing, and (3) entering summary judgment on the merits for the Government on their claim under the National Forest Management Act (the "Forest Management Act"). 779 F.Supp. 1353. Because we find that the Council and the Timber Companies lack standing to sue under any of these statutes, we affirm the district court's dismissal of the NEPA claim and entry of summary judgment on the Species Act claims, and we vacate the district court's entry of summary judgment on the Forest Management Act claim with instructions to dismiss the claim for lack of jurisdiction.

I. STATEMENT OF THE CASE

A. Background facts

The Woodpecker ranges in pine forests throughout the southeastern portion of the United States, living in clans.

Each clan makes its home in groups of live pine trees known as a colony site. To survive, the Woodpecker needs a foraging habitat with specific characteristics close to the colony site. Extensive clearing of southeastern pine forests in the first half of this century brought the Woodpecker to the brink of extinction, resulting in the listing of the Woodpecker in 1970 as an endangered species. The vast majority of remaining Woodpecker clans live in colony sites that are located on public lands, principally the various national forests in the Southern Region.

The Species Act requires the Forest Service, in consultation with the Fish and Wildlife Service, to ensure that its actions are not likely to jeopardize the continued existence of any endangered species, such as the Woodpecker. 16 U.S.C.A. § 1536(a)(2) (West 1985); 50 C.F.R. § 402.13-.14 (1992) To discharge this obligation, in 1985 the Forest Service completed a Woodpecker Chapter for its Wildlife Habitat Management Handbook that was based upon the Fish and Wildlife Service's recommended recovery plan for the Woodpecker. The Woodpecker Chapter identified certain measures to protect and conserve the Woodpecker. After engaging in formal consultation, the Fish and Wildlife Service approved the Woodpecker Chapter as submitted by the Forest Service, stating that complete implementation of the Chapter would satisfy the requirements of the Species Act.

In addition to its obligations under the Species Act, the Forest Service is required by the Forest Management Act to prepare a comprehensive land and resource management plan for each national forest. 16 U.S.C.A. § 1604. Among other things, these comprehensive plans address how wildlife will be managed and approximately how much timber the Forest Service will permit to be harvested annually. *See* 16 U.S.C.A. § 1604(e); 36 C.F.R. § 219.1 (1992) After the Woodpecker Chapter was approved by the Fish and Wildlife Service, the Forest Service incorporated the Woodpecker Chapter into its

forest plans for each of the national forests in the Southern Region with a Woodpecker population.

Although the Woodpecker Chapter was incorporated into the forest plans soon after its approval, the Woodpecker population continued to decline. Realizing that the Woodpecker Chapter might need to be revised, the Forest Service initiated informal consultation with Fish and Wildlife Service in the fall of 1988 regarding proper management for the Woodpecker. *See* 50 C.F.R. § 402.13.[1] Soon thereafter, the Forest Service received eight letters from the Sierra Club Legal Defense Fund threatening citizen suits under the Species Act, *see* 16 U.S.C.A. § 1540 (g)(2), if the Forest Service continued its "inadequate management practices" for protecting the Woodpecker. The Forest Service proceeded to develop a three-phase strategy for protecting the Woodpecker in conjunction with both the Council and the Sierra Club Legal Defense Fund, and through informal consultation with the Fish and Wildlife Service.

On March 27, 1989, the Forest Service implemented the first phase of its new Woodpecker strategy—the immediate adoption of a temporary policy governing the cutting on timber contracts within ¾ mile of a Woodpecker colony (the "Policy"). The Policy strictly limited the permissible methods for timber harvesting in those areas within ¾ mile of a Woodpecker colony, and was applicable to all awarded and pending timber contracts, advertised timber sales, and proposed timber sales.

The Timber Companies each held contracts subject to the Policy. Those contracts included an endangered

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[1] The initiation of informal consultation with the Fish and Wildlife Service followed closely on the heels of the entry of an injunction ordering the Forest Service to take certain measures to protect the Woodpecker in national forests located in Texas. *See Sierra Club v. Lyng*, 694 F.Supp. 1260 (E.D.Tex.1988), *rev'd in part and aff'd in part sub nom., Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir.1991).

species provision, which permitted the Forest Service to cancel or unilaterally modify the contracts "if the protection measures prove inadequate."[2] The Policy directed Forest Service contracting officers to request the holders of timber contracts to suspend logging on the restricted areas pursuant to the endangered species clause, and instructed the contracting officers to "[m]ake maximum possible effort to provide timber for deleted volumes" by mutual contract modification. If modification would change the sale conditions so significantly that the purchaser could not recover its original profit margin, the Policy authorized the cancellation of the contract. Each of the Timber Companies agreed to modify all of their contracts subject to the Policy.

B. Procedural history

1. *Administrative procedure*

On March 31, 1989, the Council appealed the adoption of the Policy, alleging violations of the Administrative Procedure Act (the "APA"), NEPA and the Forest Management Act. *See* 36 C.F.R. § 217. The Forest Service rejected the appeal, stating that the adoption of the Policy was not subject to administrative appeal. *See* 36 C.F.R. § 217.-3(a)(1). However, the Forest Service directed the Regional Forester for the Southern Region (1) to conduct an environmental analysis, *see* 40 C.F.R. § 1508.9 (1992), and (2) to prepare an appropriate decision document referencing the Species Act, NEPA, and the Forest Management Act.

The Regional Forester complied with this directive by (1) issuing a biological evaluation of the policy's effects and (2) issuing a decision on June 26, 1989, that documented the rationale and environmental considerations be-

[2] The contracts also contained a dispute resolution clause stipulating that the Contract Disputes Act, 41 U.S.C.A. §§ 601-613 (West Supp.1993), applied to "all disputes arising under or relating to this contract."

hind the Policy. The Council appealed the Regional Forester's decision, and notified the Secretaries of the Interior and Agriculture that it intended to file a citizen suit under the Species Act. *See* 16 U.S.C.A. § 1540(g)(2). On October 25, 1989, the Associate Deputy Chief of the Forest Service affirmed the prior decision of the Regional Forester.

2. *District court*

On December 7, 1989, the Council and the Timber Companies filed a four count complaint for declaratory and injunctive relief alleging (1) that the Forest Service had failed to fully implement the Woodpecker Chapter in violation of the Species Act, 16 U.S.C.A. § 1536, and that the Forest Service had illegally adopted the Policy (2) in violation of the Species Act, 16 U.S.C.A. § 1536, (3) in violation of NEPA, 42 U.S.C.A. § 4332(2)(1977), and (4) in violation of Forest Management Act, 16 U.S.C.A. § 1604(g).

On the Government's motion, the district court dismissed the NEPA claim on the ground that the Council and the Timber Companies lacked standing under NEPA to bring suit. After extensive briefing, the district court entered summary judgment for the Government on the remaining claims, holding that the Council and the Timber Companies lacked standing to bring suit under the Species Act and that the Forest Service's adoption of the Policy did not violate the Forest Management Act.

II. DISCUSSION

"Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). "[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Id.* Accordingly, the

"case or controversy" requirement is of special importance in cases where a federal court is being asked to rule on the legality of an act of the executive branch. *E.g., Lujan v. Defenders of Wildlife,* —— U.S. ——, ——, 112 S.Ct. 2130, 2135, 119 L.Ed.2d 351 (1992) (asking court to rule on legality of regulation promulgated by Secretary of Interior); *Allen,* 468 U.S. at 743-45, 104 S.Ct. at 3320-21 (asking court to rule on constitutionality of IRS guidelines governing tax-exempt status for private schools); *Valley Forge College v. Americans United for Separation of Church and States, Inc.,* 454 U.S. 464, 469, 102 S.Ct. 752, 756-57, 70 L.Ed.2d 700 (1982) (asking court to rule on constitutionality of transfer of government property by Secretary of Health, Education and Welfare to college operated by religious order).

A central component of Article III's "case or controversy" requirement is that the litigant must have standing to invoke the power of the federal court. *Allen,* 468 U.S. at 750, 104 S.Ct. at 3324. To have standing, a plaintiff must satisfy three constitutional requirements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Defenders of Wildlife, —— U.S. at ——, 112 S.Ct. at 2136 (citations omitted). In addition to these constitutional requirements, there are three prudential limits on standing: first, the plaintiff must assert its own rights and interests and may not rely on the rights and interests

of others; second, the federal courts will not adjudicate "abstract questions of wide public significance;" and third, the plaintiff's complaint must fall within the "zone of interests" to be protected by the statute in question. *Valley Forge*, 454 U.S. at 474-75, 102 S.Ct. at 759-60 (citing cases).[3]

A. The injuries allegedly suffered by the Council's members and the Timber Council

Before we consider whether the Council and the Timber Companies have standing, we must determine what injuries to consider in performing our standing analysis. In their complaint, the Council and the Timber Companies alleged that they suffered three types of injuries as a result of the Forest Service's failure to fully implement the Woodpecker Chapter as required by the Species Act and subsequent adoption of the Policy in violation of the Species Act, NEPA, and the Forest Management Act: (1) economic injuries; (2) environmental injuries; and (3) procedural injuries. After the district court dismissed their NEPA claim for lack of standing, the Council and the Timber Companies filed a motion for reconsideration. In connection with their motion for reconsideration, the Council and the Timber Companies submitted several affi-

[3] Finally, even if the constitutional and prudential components of standing are satisfied, three additional requirements are imposed upon a voluntary membership organization—like the Council—that seeks standing sue on behalf of its members: (1) its members must otherwise have standing to sue in their own right; (2) the interests it seeks to protect must be germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested must require the participation of the association's individual members. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). For the reasons discussed below, we conclude that the Council's members do not otherwise have standing to sue. Thus, we do not consider whether the Council has satisfied the other requirement for associational standing.

davits which both supported the original allegations and contained new allegations of "quality of life" injuries. The district court granted the motion for reconsideration and considered the affidavits, but reaffirmed its earlier order dismissing the NEPA claim for lack of standing.

On appeal, the Government contends that the district court erred in considering the affidavits because they go beyond the complaint. Because the affidavits were considered by the district court in conjunction with the grant of the motion for reconsideration, we must determine whether it was error for the district court to grant that motion. This Court has never explicitly considered the standard of review to be applied to a district court's grant of a motion for reconsideration of a non-final judgment.[4] However, when reviewing a district court's disposition of a motion for reconsideration after final judgment,[5] we have consistently stated that the decision to grant such relief is committed to the sound discretion of the district judge and will not be overturned on appeal absent an abuse of discretion. *E.g., American Home Assur. Co. v. Glenn Estess & Assocs.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985) (Rule 59(e) motion for reconsideration); *Commodity Futures Trading Comm'n v. American Commodity Group Corp.*, 753 F.2d 862, 866 (11th Cir. 1984) (Rule 60(b) motion for reconsideration). We see no reason to apply a different standard when the party seeks reconsideration of a non-final order.

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[4] Because the order dismissed only one of the four claims, it was not a final judgment. *See* FED.R.CIV.P. 54(b) ("any order or form of decision, however designated, which adjudicates fewer than all the claims . . . is subject to revision at any time before the entry of judgment adjudicating all the claims").

[5] A motion for reconsideration made after final judgment falls within the ambit of either Rule 59(e) (motion to alter or amend a judgment) or Rule 60(b) (motion for relief from judgment or order). *Inglese v. Warden*, 687 F.2d 362, 363 n. 1 (11th Cir.1982); *Woodham v. American Cystoscope Co.*, 335 F.2d 551, 554-55 (5th Cir.1964).

We hold that the district court did not abuse its discretion by granting the motion for reconsideration and considering the affidavits submitted by the Council and the Timber Companies. "[I]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing." *Warth v. Seldin*, 422 U.S. 490, 510, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975). The affidavits raising the quality of life injuries which were attached to the motion for reconsideration are "particularized allegations of fact" which support the Council's and the Timber Companies' standing. Thus, the district court did not abuse its discretion in considering those affidavits.[6]

B. Standard of Review

Whether the Council and the Timber Companies have standing to bring suit is a threshold legal issue subject to de novo review. *United States v. 5000 Palmetto Drive,*

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[6] We note that had the Council and the Timber Companies moved to amend their complaint after dismissal to allege these quality of life injuries rather than making a motion for reconsideration, the district court would have been well within the bounds of its discretion to allow the amendment. *See Czeremcha v. International Ass'n of Machinists*, 724 F.2d 1552, 1556 (11th Cir.1984) (motion for leave to amend complaint after dismissal for lack of jurisdiction "should be granted liberally"). *See also NAACP v. Town of Harrison*, 907 F.2d 1408, 1417 (3d Cir.1990) (holding that district court abused its discretion in refusing to permit plaintiff to amend its complaint after dismissal for lack of standing).

Indeed, the Council and the Timber Companies could have moved *this* court to amend their complaint to include the quality of life injuries. Lack of standing is a jurisdictional defect. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501 (1986), and under 28 U.S.C.A. § 1653 (West 1966) "[d]efective allegations of jurisdiction may be amended upon terms, in the trial or appellate courts." *But see Gillis v. United States Dep't of Health and Human Servs.*, 759 F.2d 565, 571 n. 9 (6th Cir.1985) (expressing doubt about § 1653's applicability to defective allegations of standing).

928 F.2d 373, 375 (11th Cir. 1991); *United States v. Massell*, 823 F.2d 1503, 1506 n. 2 (11th Cir. 1987). However, the nature of our review turns on the stage in the proceedings at which standing is controverted. *See Defenders of Wildlife*, —— U.S. at ————, 112 S.Ct. at 2136-37. When the defendant challenges standing via a motion to dismiss, "both trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth*, 422 U.S. at 501, 95 S.Ct. at 2206. Moreover, in making its determination, the trial court is not restricted to the face of complaint—it is free to rely on affidavits submitted by the plaintiff in support of the complaint. *Id.* When the attack on standing occurs via a motion for summary judgment, the plaintiffs can no longer rest on their allegations, "but must 'set forth' by affidavit or other evidence 'specific facts' which for the purpose of summary judgment will be taken as true." *Defenders of Wildlife*, —— U.S. at ——, 112 S.Ct. at 2137 (citing FED.R.CIV.P. 56(e)). Finally, when standing is questioned for the first time by an appellate court, standing "must affirmatively appear in the record." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990) (citing cases).[7] *See Cone Corp. v. Florida Dep't of Transp.*, 921 F.2d 1190, 1206 n. 50 (11th Cir. 1991) (looking at deposition and hearing testimony to determine whether plaintiffs had standing), *cert. denied*, —— U.S. ——, 111 S.Ct. 2238, 114 L.Ed.2d 479 (1991).

In this case, we are faced with the unique situation of applying each of these standards to determine whether the Council and the Timber Companies have standing: stand-

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[7] In examining the record, we will assume the truth of the affidavits submitted by the Council and the Timber Companies.

ing under NEPA was challenged via a motion to dismiss;[8] standing under the Species Act was challenged via a motion for summary judgment; and standing under the Forest Management Act is being raised for the first time by this court.[9] In the final analysis, however, we review the same documents to determine whether the Council and the Timber Companies have standing to sue under NEPA, the Species Act, or the Forest Management Act—the complaint and the affidavits constitute the reviewable record on appeal with regard to each standing inquiry.

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[8] The district court erroneously stated that by considering the affidavits attached to the motion for reconsideration, it had converted the motion to dismiss into a motion for summary judgment. This error was predicated upon a misunderstanding of the conversion feature of Rule 12(b). Because a motion to dismiss for lack of standing is one attacking the district court's subject matter jurisdiction, it is brought pursuant to Rule 12(b)(1). *Cone Corp.*, 921 F.2d at 1203 n. 42; *Morast v. Lance*, 807 F.2d 926, 932 n. 6 (11th Cir.1987). The conversion feature of Rule 12(b), however, is limited to motions to dismiss for failure to state a claim brought pursuant to Rule 12(b)(6). *Stanley v. CIA*, 639 F.2d 1146, 1158 (5th Cir.1981). *See generally Haase v. Sessions*, 835 F.2d 902, 906 (D.C.Cir.1987) (discussing distinction between 12(b)(1) and 12(b)(6)).

[9] The failure of the Government to raise the issue of standing under the Forest Management Act and the district court's failure to consider the issue below in no way impinges upon our ability to consider the issue for the first time on appeal. "The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of the jurisdictional doctrines.'" *FW/PBS*, 493 U.S. at 230, 110 S.Ct. at 607 (quoting *Allen v. Wright*, 468 U.S. at 750, 104 S.Ct. at 3324). *See Church of Scientology Flag Service Org., Inc. v. City of Clearwater*, 777 F.2d 598, 606 (11th Cir.1985) ("A plaintiff does not acquire standing merely because the defendant raises no objection."), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1973, 90 L.Ed.2d 656 (1986).

C. Analysis of the injuries alleged

1. *Economic injuries*

The Council and the Timber Companies alleged three economic injuries flowing from the failure of the Forest Service to either fully implement the Woodpecker Chapter or comply with the procedural dictates of NEPA, the Species Act and the Forest Management Act in adopting the Policy: (1) a reduction in available timber under the contracts; (2) increased logging costs under the contracts; and (3) a reduction in the future timber supplies.

The first two injuries are not jurisdictionally cognizable by this court, because they arise out of contracts with the United States. The Timber Companies' contracts provide that "all disputes arising under or relating to" the contracts are to be resolved in accordance with the Contract Disputes Act (the "CDA").[10] The effect of that provision is to strip the district court of jurisdiction over any claim founded upon the contract. *See* 28 U.S.C.A. § 1346(a)(1) (West Supp. 1992) ("the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States . . . which are subject to . . . the Contract Disputes Act").

Whether an action is founded upon a contract is determined by looking to the source of the rights upon which the plaintiff bases its claims and the nature of relief sought. *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C.Cir. 1982). Had the Council and the Timber Com-

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[10] Even if the contracts did not so provide, the CDA would apply to the Timber Companies' contract claims. *See* 41 U.S.C.A. § 602(a)(4) ("applies to any express or implied contract . . . entered into by an agency for the disposal of personal property"). *See also North Side Lumber Co. v. Block*, 753 F.2d 1482, 1486 (9th Cir.) (timber contract falls within the Contract Disputes Act), *cert. denied*, 474 U.S. 919, 106 S.Ct. 248, 88 L.Ed.2d 256 *and cert. denied*, 474 U.S. 931, 106 S.Ct. 265, 88 L.Ed.2d 271 (1985).

panies sought contractual relief for their contractual injuries, the CDA would have divested the district court of jurisdiction to hear their claims. However, by grounding their complaint in NEPA, the Species Act and the Forest Management Act, the Council and the Timber Companies seek to avoid this result. *Cf. Megapulse*, 672 F.2d at 968-69 (jurisdiction where claim based on Trade Secrets Act). Now that their standing to bring suit under these statutes is questioned, the Council and the Timber Companies point to the contracts as the source of their injuries. To permit this would allow the Council and the Timber Companies to avoid the express mandate of Congress that claims arising out of a contract with the United States be heard pursuant to the process set forth in the CDA rather than in district court. *See* 41 U.S.C.A. §§ 601-613; 28 U.S.C.A. § 1346(a)(1). Although the Council and the Timber Companies are free to bring claims under NEPA, the Species Act and the Forest Management Act, they may not predicate their standing to sue under those statutes upon contractual injuries.[11]

In addition to their injuries under the contracts, the Council and the Timber Companies allege that the actions of the Forest Service economically injure them by reduc-

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[11] The Council and the Timber Companies rely entirely on *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971), to support their contention that the CDA does not bar our consideration of their contract injuries in assessing whether they have standing. In *National Helium*, a corporation whose government contract was terminated brought suit, alleging that the termination was subject to the requirements of NEPA. The Tenth Circuit agreed, and ordered the Secretary of the Interior to comply with NEPA before terminating the contract. While superficially similar to the case before us. *National Helium* contains no discussion of the corporation's standing to bring suit under NEPA. Thus, it is possible that the plaintiff in *National Helium* suffered a non-contractual injury sufficient to confer standing under NEPA. To the extent that *National Helium* supports the notion that an injury arising out of a government contract will support a non-contract action, we disagree.

ing the amount of timber available for future contracts. This injury fails for two reasons. First, no right is conferred on the Timber Companies to harvest a set amount of timber each year. The Forest Management Act requires the Forest Service to determine harvest levels, 16 U.S.C.A. § 1604(e), but to "limit the sale of timber to a quantity *equal to or less than* a quantity which can be removed for such forest annually in perpetuity on a sustained yield basis," 16 U.S.C.A. § 1611(a) (emphasis supplied). Indeed, the Council and the Timber Companies have no right to compel the Forest Service to sell any future timber to them. *See Intermountain Forest Industry Ass'n v. Lyng*, 683 F.Supp. 1330, 1340 (D.Wyo. 1988) (timber companies have no right to future timber).[12]

Second, even if the Council and the Timber Companies could be said to have a right to future timber, this injury fails to satisfy the third constitutional element of standing—there is not a "substantial likelihood" that this injury will be redressed by the relief they seek. *See Duke Power Co. v. Carolina Env'l Study Group, Inc.*, 438 U.S. 59, 75 n. 20, 98 S.Ct. 2620, 2631, n. 20, 57 L.Ed.2d 595 (1978). By this action, the Council and the Timber Companies seek an order requiring the Forest Service to fully implement the Woodpecker Chapter and to set aside the Policy because it does not comply with procedures mandated by NEPA, the Species Act, and or Forest Management Act. Whether this relief would result in greater timber availability in the future is purely speculative. The amount of timber available in the future is based upon

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[12] The Council and the Timber Companies argue that their position is analogous to that of a losing bidder on a government contract. *See Choctaw Mfg. Co., Inc. v. United States*, 761 F.2d 609, 615 (11th Cir.1985) (losing bidder has standing to challenge award of government contract). The Council and the Timber Companies fail to appreciate that a losing bidder has a right that bid procedures be conducted in accordance with the applicable statutes and regulations, and that its bid not be arbitrarily rejected. *Id.* at 615-16. No such right is conferred upon the Timber Companies.

site-specific analyses, *see* 16 U.S.C.A. § 1604(g)(3)(E)-(F), which may or may not be affected by either full implementation of the Woodpecker Chapter or by setting aside the Policy. *Cf. ASARCO Inc. v. Kadish*, 490 U.S. 605, 614, 109 S.Ct. 2037, 2043, 104 L.Ed.2d 696 (1989) (denying standing where question of whether injury would be redressed by favorable decision "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict").

2. *Quality of life injuries*

The Council and the Timber Companies allege three quality of life injuries caused by the Forest Service's failure to fully implement the Woodpecker Chapter or comply with the procedural requirements of NEPA, the Species Act and the Forest Management Act in adopting the Policy: (1) layoffs and income reductions; (2) a decreasing tax base; and (3) a loss in public services.[13] These quality of life injuries are simply attenuated versions of the economic injuries we have already considered. The Council and the Timber Companies allege that they will suffer these injuries because less timber is available under the contracts and less timber will be available in the future. Accordingly, they suffer from the same infirmities

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[13] In their brief on appeal, the Council and the Timber Companies attempt to supplement these injuries, arguing that their quality of life will be affected by a decrease in receipts from the Forest Service, which will result in a loss of public services. Under 16 U.S.C.A. § 500, 25% of Forest Service timber receipts are returned to local counties "for benefit of the public schools and public roads." As this injury is being alleged for the first time in their appellate brief, we may not consider it now, because our standing review is restricted to the complaint and the affidavits. *See Williamsport Area School Dist.*, 475 U.S. at 547, 106 S.Ct. at 1334 (facts supporting standing "may not be gleaned from the briefs and arguments themselves").

as the economic injuries—to the extent the injuries arise out of the timber contracts, they will not support claims under NEPA, the Species Act or the Forest Management Act; to the extent they will result from a decrease in future timber availability, the Council and the Timber Companies have no right to future timber. Thus, the quality of life injuries do not provide a basis for standing.

3. *Environmental injury*

In addition to their economic injuries, the Council and the Timber Companies also allege an environmental injury caused by the Forest Service's failure to fully implement the Woodpecker Chapter or to follow the proper procedures in enacting the Policy. Specifically, they claim to be "intereted in developing [Woodpecker] strategies which are consistent with forest plans, are scientifically defensible, and do not impose unwarranted restrictions on timber harvesting." Standing alone, this alleged injury does not satisfy the injury-in-fact requirement of standing. To support a plaintiff's standing to sue, the injury alleged must be personal. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979). The Council and the Timber Companies, by contrast, have alleged nothing more than an interest in developing Woodpecker strategies, and a mere interest in a problem, no matter how longstanding the interest, is insufficient to confer standing. *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972).

To give focus to their otherwise generalized interest in Woodpecker strategies, the Council and the Timber Companies claim that their interest is at least partly motivated by their employees' interest in the outdoors.[14] This at-

[14] The Council and the Timber Companies also argue that their interest in Woodpecker strategies is motivated by their economic injuries. For the reasons previously discussed, these injuries are insufficient to confer standing.

tempt by the Council and Timber Companies to rely on their employees' interest in the environment runs afoul of the prudential limitation that plaintiffs must assert their own rights and may not rest upon the rights of others. *See Warth*, 422 U.S. at 499, 95 S.Ct. at 2205. We deviate from this limitation only when (1) the plaintiff seeking to assert the third party's rights has otherwise suffered an injury-in-fact, (2) the relationship between the plaintiff and the third party is such that the plaintiff is nearly as effective a proponent of the third party's right as the third party itself, and (3) there is some obstacle to the third party asserting the right. *Singleton v. Wulff*, 428 U.S. 106, 113-16, 96 S.Ct. 2868, 2873-75, 49 L.Ed.2d 826 (1976).

None of these elements are satisfied in this case. First, as previously discussed, the Council and the Timber Companies have not suffered an injury-in-fact. Second, in this case the employee/employer relationship is not such that the employer would be nearly as effective a proponent as the employees. In cases allowing third-party standing, the relationship between the party asserting the right and the third party has been characterized by a strong identity of interests which is absent an employer/employee relationship. *See, e.g., Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 840-42, 97 S.Ct. 2094, 2107-08, 53 L.Ed.2d 14 (1977) (parents had standing to assert rights of children); *Griswold v. Connecticut*, 381 U.S. 479, 481, 85 S.Ct. 1678, 1679, 14 L.Ed.2d 510 (1965) (doctor had standing to assert rights of patients). Finally, there is no obstacle to the employees bringing suit to protect their own interest in the environment. *Cf. NAACP v. Alabama*, 357 U.S. 449, 459, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958) (individual members of NAACP could not resist court order on first amendment grounds without nullifying their first amendment right). Thus, we will not permit the Council

and the Timber Companies to assert their employees' interest in the environment to gain standing in this case.[15]

4. *Procedural injuries*

Finally, the Council and the Timber Companies allege that the failure of the Forest Service to comply with the procedures mandated by NEPA, the Species Act, and the Forest Management Act in adopting the Policy injured their rights to information, participation, and informed decision making. These injuries are nothing more than generalized grievances which fail to satisfy the injury-in-fact requirement for standing.

A similar injury was before the Supreme Court in *Defenders of Wildlife*, —— U.S. at ——, 112 S.Ct. at 2142-2146, where the Court considered a challenge by several environmental groups to a regulation promulgated by the Secretary of Interior. The environmental groups argued that they had standing to challenge the Secretary's failure to follow the correct procedure in enacting the regulation because the Species Act conferred upon them a right to have the correct procedures followed. The Supreme Court denied the environmental groups standing on this ground, stating that the alleged injury to the plaintiff's procedural rights was nothing more than a "generalized

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[15] The district court also concluded that the Council and the Timber Companies lacked standing to assert the interests of their employees. However, rather than using the third-party standing analysis to reach this conclusion, the district court used the three part test for associational standing set forth in *Hunt*, 432 U.S. at 343, 79 S.Ct. at 2441. Although we agree with the district court's conclusion, we do not agree with the its method. The associational standing test articulated in *Hunt* is properly reserved for voluntary membership organizations—like trade association or environmental groups—and has no application to a corporation's standing to assert the interests of its employees. *See* 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.9 at 617 (2d ed. 1984) ("The greatest care should be taken with associations whose members have little choice whether to be members and have divergent interests.").

grievance about government" which "does not state an Article III case or controversy." *Id.* at ——, 112 S.Ct. at 2143. Like the procedural injuries asserted by the environmental groups in *Defenders of Wildlife*, the injuries asserted by the Council and the Timber Companies to their rights to participation, information, and informed decision making are generalized grievances which do not state an Article III controversy. The asserted injuries are not peculiar to the Council and the Timber Companies, but rather are shared by all citizens.[16]

In reaching its holding, the Supreme Court noted that if the environmental groups had suffered an injury to a separate concrete interest, they would have had standing to assert a procedural injury. *Id.* at —— n. 7, 112 S.Ct. at 2142 n. 7. The Council and the Timber Companies rely on this statement, arguing that unlike the environmental groups in *Defenders of Wildlife*, they have suffered an injury to a separate concrete interest. This argument fails. As our previous discussion makes clear, neither their alleged economic injuries, quality of life injuries, or environmental injuries constitute injury to a separate concrete interest. Thus, the Council and the Timber Companies do not have standing to assert their procedural injuries.

III. CONCLUSION

In sum, we hold that the Council and the Timber Companies have failed to establish an injury to themselves sufficient to confer standing. Accordingly, we AFFIRM the district court's dismissal of the NEPA

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[16] This is not a case where the failure to follow a mandated procedure caused a distinct injury, different from that suffered by the public generally. *See Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83-85 (D.C. Cir.1991) (discussing how injury to right to information might support standing where the purpose of the organization seeking the information was to disseminate the information).

claim for lack of jurisdiction and entry of summary judgment in favor of the Government on the Species Act Claim. Because we conclude that the Council and the Timber Company lacked standing to bring suit under the Forest Management Act, the district court lacked jurisdiction to adjudicate this claim. Accordingly, we VACATE the judgment of the district court with respect to the Forest Management Act claim with directions to dismiss that portion of the action.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. 1:89-cv-2741-ODE

SOUTHERN TIMBER PURCHASERS COUNCIL; HANKINS LUMBER COMPANY, INC.; HOOD INDUSTRIES, INC.; and HUNT PLYWOOD COMPANY, INC.

VS.

JOHN E. ALCOCK, in his official capacity as Regional Forester for Region 8 of the United States Forest Service; F. DALE ROBERTSON, in his official capacity as Chief, of United States Forest Service; JAMES W. PULLIAM, JR., in his official capacity as Regional Director of Region 4 of the United States Fish and Wildlife Service; and MANUEL LUJAN, in his official capacity as Secretary of the United States Department of the Interior

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ORDER

[Filed July 29, 1991]

This action arising under the National Forest Management Act, 16 U.S.C. § 1604 *et seq.*, ("the Forest Act") is before the court on the parties' cross-motions for summary judgment. Fed.R.Civ.P. 56.

This dispute arises from the actions of Defendants, officials of the United States Forest Service ("the Forest Service"), restricting timber cutting within ¾ of a mile of a colony site of red cockaded woodpeckers. The red cockaded woodpecker is considered an endangered species under the Endangered Species Act, 16 U.S.C. § 1531

et seq. See, 50 C.F.R. § 1711(h). Pursuant to the Forest Act and regulations promulgated thereunder, 36 C.F.R. § 219, the Forest Service arrived at a plan to manage the red cockaded woodpecker. *1985 Wildlife Habitat Management Handbook* ("Woodpecker Handbook"). The Woodpecker Handbook was incorporated into the Land Resource Management Plan (discussed below) for Region 8. Plaintiffs (collectively "the Council") allege that sometime in the late 1980's, the Forest Service discontinued full implementation of the Woodpecker Handbook, and then, in response to threatened litigation from environmental groups, hastily adopted a new policy ("1989 Woodpecker policy"). The Forest Service contends that the 1989 Woodpecker policy was adopted in response to the failure of the policy embodied in the Woodpecker Handbook to prevent a severe decline in the numbers of the red cockaded woodpecker.

The change in the red cockaded woodpecker policy was first adopted by Regional Forester Alcock on March 27, 1989, after consultation with both environmental groups and Plaintiff Southern Timber Purchasers Council. (A.R. 31). The Regional Forester noted that it was not determined whether the new policy was consistent with the existing plan, but stated that the former would supersede the latter until the plan could be amended. The policy then went on to halt or modify timber cutting within ¾ of a mile of red cockaded woodpecker colonies and to suspend cutting under contracts already in existence.

The Council appealed this decision to the Deputy Chief of the Forest Service pursuant to regulations, 36 C.F.R. § 217. The Deputy Chief responded April 14, 1989, noting that the Regional Forester had adopted the interim policy without the formal prerequisites necessary to make it an appealable decision. He then remanded the issue to the Regional Forester with directions to comply with the procedures by conducting an environmental analysis

and preparing the appropriate decisional document. He continued:

> The decision document must include a reference to the consideration of compliance with the Endangered Species Act, the National Environmental Policy Act, and the National Forest Management Act in establishing this policy. The decision document will be subject to administrative appeal under 36 CFR Part 217.
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> [I]n addition to the above, the Regional Forester is directed to: inform the public through a Federal Register notice of the Regional Forester's intent to amend the Regional Guide and in the notice provide the public with an opportunity to comment on how the Forest Service will comply with the Endangered Species Act, the National Forest Management Act, and the National Environmental Policy Act.

(A.R. 29).

A biological evaluation of the proposed policy was made by the Forest Service's Endangered Species Program Manager on May 3, 1989. That evaluation found that the policy was "not likely to adversely affect the RCW." (A.R. 27). Notice of the Regional Forester's intent to implement the new policy was published in the Federal Register on May 5, 1989. (A.R. 23). The Fish and Wildlife Service reviewed the policy on June 15, 1989, and concurred with the previous biological evaluation. (A.R. 19). On June 26, 1989, the Regional Forester issued an Environmental Assessment, Findings of No Significant Impact and Decision Notice ("Decision Notice"). (A.R. 16).

The Decision Notice incorporated the biological evaluation and the Fish and Wildlife Service report. The first portion of the Decision Notice is the environmental assessment. This notes that the declining numbers of

the red cockaded woodpecker necessitated action to ensure their survival.

> The March 27 Policy was issued as a temporary measure of limited scope. It covers only cutting practices within ¾ mile of active and inactive RCW colonies in populations of less than 250 colonies. It applies only to existing, advertised and proposed sales until new direction is issued. The policy was intentionally created to be flexible in dealing with "on the ground" situations and new information so as to maximize the Forest Service's ability to quickly comply with ESA [Endangered Species Act] and other laws.

(A.R. 16). The Regional Forester also emphasized that the effect of the policy was merely to protect the status quo.

> The Policy is urgent and temporary. Moreover, it makes no irretrievable or irreversible commitment of resources. Insofar as this policy prevents certain payment units from being cut the environmental status quo continues. Options for future actions to promote recovery of the RCW remain open.

(A.R. 16).

The second portion of the Decision Notice determines that the new policy does not significantly affect the

> human environment [because it] is limited in time and scope:
>
> —it will continue only until new direction currently being formulated is completed:
>
> —it addresses only cutting methods within ¾ mile of RCW colonies;
>
> —relatively few areas are affected;
>
> —it results in fewer trees being cut, hence maintaining the environmental status quo;

> —where the status quo may be changed, further NEPA NFMA ESA analysis will be done at the project level; and
>
> —it is necessary to protect the RCW as required by the Endangered Species Act.

(A.R. 16).

The third portion of the Decision Notice contains the decision itself. The Regional Forester decided that the March 27, 1989 policy would continue in effect and constituted an amendment to the Land Resource Management Plan for the region. He also noted the temporary and limited extent of the policy and reiterated that the amendments were not significant for purposes of compliance with the amendment procedures under the Forest Act. "This determination is based on the fact that this policy is limited to existing advertised and proposed sales for the limited period until new direction is issued." (A.R. 16).

The Council appealed the Decision Notice to the Deputy Chief of the Forest Service. The Deputy Chief affirmed the Regional Forester on October 25, 1989. In particular, the Deputy Chief determined that the Regional Forester's actions in the face of unstable and declining red cockaded woodpecker populations necessitated quick action to preserve the status quo while a future plan was worked out. Any other course, the Deputy Chief noted, could allow the populations to so decline as to foreclose future management options. The Deputy Chief also explicitly agreed that the new policy, because it is temporary and limited in scope, is not a significant amendment to the LRMP. (A.R. 1).

Subsequent to the affirmance by the Deputy Chief, the Council brought this suit to review the Forest Service's adoption of the 1989 Woodpecker policy.

Before describing the arguments of the parties, it is necessary to outline quickly the relevant procedural re-

quirements under the Forest Act and its implementing regulations.

"National Forests, unlike the national parks, are not wholly dedicated to recreational and environmental values." *Cronin v. United States Dept. of Agric.,* 919 F.2d 439, 448 (7th Cir. 1990). Rather, they are dedicated by Congress to sustaining multiple uses, including "outdoor recreation, range, timber, watershed, and wildlife and fish purposes." Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. § 528. At the same time, under the Forest Act, the Forest Service has a duty to protect endangered wildlife and its habitat through resource management. 36 C.F.R. § 219.19(a)(7); *see generally, Seattle Aububon Soc. v. Robertson,* No. 89-160WD (W.D. Wash. March 7, 1991) p. 10-14.

The primary engine of resource management under the Forest Act is the Land Resource Management Plan,[1] which occurs at the forest level. 16 U.S.C. § 1604. The national stage in the planning process is the Renewable Resources Assessment and Program which is established by the Secretary and analyzes both the supply and demand for the resources of the National Forests and the costs and values of those resources and uses. 36 C.F.R. § 219.4(b)(1). Next, the Regional Forester creates a Regional Guide which reflects the goals of the national program and provides "tentative resource objectives for each Forest. . . ." 36 C.F.R. § 219.4(b)(2). The Forest Supervisor then prepares a plan for each forest, or for all forests for which he has responsibility, which is known as a Land Resource Management Plan ("LRMP"). The LRMP shall include alternatives, at least one of which incorporates the tentative objectives set forth in the Re-

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[1] C. Wilkerson and H. Anderson, *Land and Resource Planning in the National Forests,* 64 Or. L. Rev. 1, 8 (1985). This article discusses at great length the structure of the nation's environmental statutes, in particular the Forest Act and the role of the Land Resource Management Plan.

gional Guide, and must be approved by the Regional Forester. 36 C.F.R. § 219.5.

The entire process of national, regional and forest planning is subject to broad public participation rights, interdisciplinary consultation, and cost-benefit analysis (including environmental as well as commercial values). 16 U.S.C. § 1604(d); 36 C.F.R. 219.10-12. The LRMP is required to articulate alternatives and to evaluate each. 36 C.F.R. 219.10-12. Additionally, an environmental impact statement, as defined by the National Enrimonental Protection Act, must be prepared.

It is undisputed that the Regional Guide and LRMP at issue in this case were adopted according to proper procedures. At issue is the procedure for implementation and amendment of the LRMP, particularly Regional Forester Alcock's compliance or non-compliance with those procedures in implementing the 1989 Woodpecker policy. The Forest Act itself addresses revisions of the LRMP, or implementation which requires amendments to the LRMP, in two provisions. First, the Act mandates that "Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." 16 U.S.C. § 1604(i). Second, the statute requires that any action which constitutes a "significant change" in the LRMP be subject to the same procedure as is necessary to formulate the LRMP itself. 16 U.S.C. § 1604(F)(4).

The regulations in the Code of Federal Regulations mirror the statutory requirements in section 1604. 36 C.F.R. § 219.10(e) and (f). The Forest Service has organized and more fully explicated the consistency requirement and the amendment process which it triggers in its *Land Resource Management Planning Handbook*, especially at chapter 5. FSH 1909.12, ch. 5. A chart of the process is included in the LRMP Handbook, and is attached to this opinion as Figure 1. The LRMP Hand-

book requires that consistency findings be made and documented. If the action is not consistent, the LRMP Handbook provides that the Forest Service must either modify the action or amend the LRMP. The Forest Service must then determine whether the amendment constitutes a "significant change" to the LRMP. The LRMP Handbook directs the Forest Service that four factors, along with any others which are appropriate to the circumstances, "are to be used in determining whether a proposed change to a forest plan is significant or not significant. . . ." FSH 1090.12, ch. 5.31b. If the amendment is found to be significant, then the amendment is subject to the procedural requirements governing the LRMP itself. If the amendment is found not to be significant, then it is subject only to a thirty day notice requirement and the completion of an environmental assessment. FSH 1090.12, ch. 5.4.[2]

This dispute raises a threshold question: which decision of the Forest Service is properly under review. The Council contends that the initial March 27, 1989 decision is reviewable because it had immediate effect, and was not stayed during the administrative appeal process. The Forest Service answers that the June 26, 1989 Decision Notice and the Deputy Chief's order affirming it represent the final order for purposes of review, because the earlier statement of policy lacked the requisite documentation to be an administratively appealable document.

The Council correctly states that section 704 of the Administrative Procedure Act, 5 U.S.C. § 704, determines finality for purposes of judicial review. Section 704 pro-

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[2] The Council does not challenge Forest Service procedure after the "no significant amendment" stage. Rather, the Council contends that the Forest Service's conduct leading up to and including that determination was defective.

The relevant facts in this case are contained in the Administrative Record, and are not in dispute. Consequently, this dispute is ripe for summary judgment on the legal significance of the undisuted facts. Fed.R.Civ.P. 56.

vides for review only of "final agency action," which excludes interlocutory review of "intermediate" agency decisions, although intermediate decisions are reviewable after the agency decision becomes final. Once the agency decision is "otherwise final," however, it is

> final for purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

The Supreme Court has taken a practical approach to the definition of "final" agency action. "The Court looks to see whether the action is 'definitive'; whether it has a direct and immediate effect on the parties; and finally, whether judicial review will serve efficiency or enforcement of the regulatory scheme." *Newport Galleria Group v. Deland*, 618 F. Supp. 1179, 1185 (D.D.C. 1985) (citing *Fed. Trade Comm'n v. Standard Oil Co. of California*, 449 U.S. 232, 240-43 (1980)). Accordingly, where a motion to reconsider or for rehearing has been filed with the agency, "there is no final action until the rehearing is denied. . . ." *Outland v. Civil Aeronautics Bd.*, 284 F.2d 224, 227 (D.C. Cir. 1960) (discussing section 704, in its prior codification at 5 U.S.C. § 1009 (c), and its legislative history), *cited with approval in, Aeromar v. Dept. of Transportation*, 767 F.2d 1491, 1492 (11th Cir. 1985); *ECEE, Inc. v. Federal Energy Reg. Comm'n*, 611 F.2d 554, 557 (5th Cir. 1980). This rule allows the agency to modify or overrule its prior determination so as to obviate the need for inefficient judicial review. *Id.*; *accord, Newport Galleria Group*, 618 F. Supp. at 1185 (citing *Standard Oil Co. of California*, 449 U.S. at 240-43). It also serves the interests of the separation of powers by allowing the executive branch to solve its own mistakes before the judiciary steps in to re-

view. *McKart v. United States*, 395 U.S. 185, 194 (1969); *accord, Sierra Club v. Lyng*, 694 F. Supp. 1256, 1259 (E.D. Tex. 1988)).

The Council urges the court to ignore the administrative appeal process which it instigated. In particular, the Council urges the court to refuse to consider the Decision Notice, arguing that becase the Decision Notice merely continued the earlier policy, judicial review must focus on the earlier document. In essence, although the Council appealed the March decision and succeeded in having it remanded to the Regional Forester for compliance with the proper procedures, the Council is now attempting to have the earlier decision reviewed by this court.

The waste of judicial and agency resources which the Council urges the court to commit is just what is sought to be avoided by the rule recognized in *Outland*, 284 F.2d at 227. *See also, Newport Galleria Group*, 618 F. Supp. at 1185; *Standard Oil Co. of California*, 449 U.S. at 240-43). The filing of an appeal necessarily signals a willingness to accept a new result as the new final action, rendering the prior action non-final. *See Outland*, 284 F.2d at 227. It hardly "serve[s] efficiency or enforcement of the regulatory scheme" to allow judicial review of an agency decision which the agency itself has already reversed and replaced. *See, Newport Galleria Group*, 618 F. Supp. at 1185 (citing *Standard Oil Co. of California*, 449 U.S. at 240-43). The Council appealed the March policy and won a partial victory. Although the Deputy Chief dismissed the appeal as premature, he also found that the Regional Forester had announced the policy with inadequate procedural steps and remanded with directions. On the remand, the Regional Forester issued an appealable Decision Notice. *See*, 36 C.F.R. § 217.3. Thus, in response to the Council's appeal, the Forest Service attempted to correct its actions to conform them to the statute and the regulations. Re-

view of the earlier decision, therefore, would be inefficient, rendering the March decision non-final for purposes of judicial review.[3] The final action, therefore, is the June 26, 1989 Decision Notice.[4]

The Council challenges the 1989 Woodpecker policy on three grounds. First, the Council argues that even if the Decision Notice represents the final agency action, it nonetheless comes too late to support the implementation of the policy from March to June, 1989. Second, the Council contends that the Decision Notice fails to make a written determination of consistency, as required by regulation. Finally, the Council attacks the Regional Forester's determination that the 1989 Woodpecker policy does not significantly change the LRMP, contending that he did not consider all of the requisite factors and that the determination was in any event incorrect.

The Standard of review for agency decisions is set forth in the Administrative Procedure Act:

> . . . The reviewing court shall—
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—

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[3] The Council also urges that, because the March policy was merely continued in the Decision Notice, the former is therefore final. This argument, however, does not respond to the fundamental inefficiency of allowing a party to both successfully appeal an administrative decision and yet seek review of the earlier, uncorrected decision. This inefficiency rationale differs from the immediacy prong of the *Standard Oil Co.*, test, upon which the Council's argument draws. Moreover, as discussed below, retroactivity of an agency action is allowed if reasonable.

[4] The Forest Service contends that only the October 25, 1989 order from the Deputy Chief, affirming the June Decision Notice is reviewable as final action. However, inasmuch as the Deputy Chief's decision merely affirms the Regional Forester, it is the former's decision which the court must address. *See, Graham v. Bowen*, 790 F.2d 1572, 1574 n.2 (11th Cir. 1986) (discussing relationship between the Administrative Law Judge and the Appeals Council in disability benefits case).

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law.
>
> * * *
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706. "When applying subsection (A), we must consider whether the decision is based 'on a consideration of all the relevant factors and whether there has been a clear error of judgment.' " *Citizens for Environmental Quality, v. United States,* 731 F. Supp. 970, 983 (D.Colo. 1989) (applying the Forest Act) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971)). This standard is deferential, presumes the validity of the agency action, and directs the court not to constitute its judgment for that of the agency. *Manasota-88, Inc. v. Thomas,* 799 F.2d 687, 691 (11th Cir. 1986). However, "[i]t is well settled that an Executive Agency of the Government is bound by its own regulations, which have the force and effect of law, and the failure of an agency to follow its own regulations renders its decision invalid. . . . It is not material whether the regulation was suostantive or procedural. . . ." *Gulf States Mfrs., Inc. v. N.L.R.B.,* 579 F.2d 1298, 1308 (5th Cir. 1978); *accord, City Cab Co. of Orlando, Inc. v. N.L.R.B.,* 787 F.2d 1475, 1480 (11th Cir.), *cert. denied,* 479 U.S 828 (1986)).

The Council's first argument is that the Decision Notice is procedurally inadequate to support implementation

of the 1989 Woodpecker policy for the period from March 27 to June 26, 1989. The Council characterizes the Decision Notice as a post hoc rationalization and a belated attempt to paper over the prior failure to document the decision to implement a new policy. According to the Council, section 1604(f)(4) of the Forest Act as well as the Forest Service Manual, FSM § 1922.41.1, and the Forest Service LRMP Handbook, FSH § 5.31a, require that the amendment to the LRMP must take place before implementation of an inconsistent policy. Inasmuch as the Decision Notice merely continues the earlier decision, the Council contends that it comes too late to justify the earlier action.

Consonant with the dsicussion above concerning final agency action, the Council's argument misconstrues the effect of an administrative appeal decision, even an informal one such as here, which modifies an earlier decision. The agency must be allowed to use its internal administrative appeal procedure to correct its own errors. If, after correcting them, the agency chooses to give retroactive effect to its new decision, that is within its power. *See, United States v. An Article of Drug Neo-Terramycin,* 540 F. Supp. 363, 373 (N.D. Tex. 1982), *aff'd,* 725 F.2d 976 (5th Cir. 1984) (An agency can give retroactive effect to a rule or policy so long as it is reasonable). Therefore, this argument fails.

The Council next challenges the 1989 Woodpecker policy on the grounds that it fails to make a written finding of consistency as required by regulations. FSM 1922.41.1, 1922.5; FSH 1090.12, ch. 5.31a, 5.4. The Forest Service does not respond directly to this contention. However, upon review of the Decision Notice it is apparent that a finding of inconsistency was made. Under the regulatory scheme, a finding of consistency ends the documentation process. That is, the action does not require an amendment to the LRMP and the attendant procedures. Because such a finding insulates the Forest

Service from accountability, the regulations require that it be made on the record. However, a finding of inconsistency triggers all the procedures designed to insure accountability. Therefore, although the regulations require that the determination be made on the record, there is no reason to read such a requirement in a draconian manner where the Forest Service nonetheless subjects itself to the ensuing procedures. In this case, the Decision Notice clearly states that "[t]he policy is hereby an amendment to the LRMP's for those National Forests covered by it." (A.R. 16) This indicates that the Regional Forester has declined to make a finding of consistency, *i.e.*, he has found the policy inconsistent with the LRMP, and has moved on to the amendment procedure which follows an inconsistent action. *See*, LRMP Handbook, FSH 1909.12, ch.5.3. Consequently, the record reveals that a finding of inconsistency was made.

The Council next challenges the Forest Service's determination that the 1989 Woodpecker policy, although it is inconsistent with the LRMP, does not significantly change the LRMP. 16 U.S.C. § 1604(f)(4); 36 C.F.R. § 219.10 (f); LRMP Handbook, FSH 1909.12, ch. 5.32. Analysis of this issue proceeds from the four factors set forth in the LRMP Handbook but includes as well "[o]ther factors" appropriate to the circumstances. LRMP Handbook, FSH 1909.12, ch. 5.32(3). The four enumerated factors are: (a) Timing, (b) Location and Size, (c) Goals, Objectives, and Outputs, and (d) Management Prescription.[5] *Id.* The phrasing of the factors indicates

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[5] The definition of Goals, Objectives, and Outputs given in the LRMP Handbook reads:

> Determine whether the change alters the long-term relationships between the levels of goods and services projected by the forest plan. Consider whether an increase in one type of output would trigger an increase or decrease in another. Determine whether there is a demand for goods or services not discussed in the forest plan. *In most cases, changes in outputs are not likely to be a significant change in the forest plan*

that no single one is conclusive. *See, LRMP Handbook*, FSH 1909.12, ch. 5.32 ("The following factors are to be used when determining whether a proposed change to a forest plan is significant or not significant. . . ."). The Council challenges the Regional Forester's determination of no significant change on two related grounds: the first procedural, and the second substantive.

First, the Council contends that the Decision Notice is procedurally defective because it (a) did not consider each of the four factors, and (b) considered the danger to the red cockaded woodpecker although conservation concerns are not listed among the four factors. The "other factors" language in the LRMP Handbook renders the latter proposition meritless. As to the former, the Council contends that the Decision Notice merely focusses on the timing. For the reasons stated below, the Decision Notice reveals that the Regional Forester considered all four factors.

Second, the Council contends that based on the four factors set forth in the LRMP Handbook, the Regional Forester's finding that the 1989 Woodpecker policy does not constitute a significant cvhange is arbitrary and capricious.[6] That is to say, the decision is not "based 'on a

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unless the change would forego the opportunity to achieve an output in later years.

The definition of Management Prescription given in the LRMP Handbook reads:

> Determine whether the change in a management prescription is only for a specific situation or whether it would apply to future decisions throughout the planning area. Determine whether or not the change alters the desired future condition of the land and resources or the anticipated good and services to be produced.

FSH 1909.12, ch. 5.32(3)(c) and (d).

[6] The Council also raises an argument based on the legislative intent behind the Forest Act. This argument is a mere make-weight, and is not persuasive.

consideration of all the relevant factors and [represents] a clear error of judgment.' " *Citizens for Environmental Quality, Inc.*, 731 F. Supp. at 983 (applying the Forest Act) (quoting *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416).

The Council has failed to show that the Regional Forester did not consider the relevant factors or that his judgment was clearly in error. What the Council's argument declines to recognize is the ameliorative effect of the abbreviated nature of the 1989 Woodpecker policy. Although the policy was implemented during the current LRMP's lifetime, it is temporary only and need not extend beyond the LRMP period. This profound limitation weakens the policy's effect in each of the other three factors. For example, because timber protected from cutting under the policy may be re-claimed at a later time, its effect on "Goals, Objectives, and Outputs" is small. FSH 1909.12, ch. 5.32(3)(c). Similarly the policy protects the "desired future condition of the land and resources" set forth in the management prescription. FSH 1909.12, ch. 5.32(3)(d). Finally, the area affected is a small portion of the total area subject to timber cutting under the LRMP. In sum, the policy is a temporary attempt to preserve the status quo in certain discrete locations while a later policy can be weighed, which seriously limits the policy's significance to the LRMP. Moreover, the 1989 Woodpecker policy merely calls a time-out during which the current LRMP strategy for protecting the red cockaded woodpecker, *i.e.*, the Woodpecker Handbook, can be re-evaluated. As such, it does not significantly amend the LRMP, but rather represents a prudent step in carrying it out.

This reasoning, furthermore, is documented in the Decision Notice.

> Based on the information contained in the Policy of March 27 and the rationale provided above, I have determined that this Policy is not an action

which has a significant effect on the human environment. The action is limited in time and scope:

> —it will continue only until new direction currently being formulated is completed;
>
> —it addresses only cutting methods within ¾ mile of RCW colonies;
>
> —relatively few areas are effected;
>
> —it results in fewer trees being cut, hence maintaining the environmental status quo;
>
> —where the satus quo may be changed, further NEPA/NFMA/ESA analysis will be done at the project level; and
>
> —it is necessary to protect the RCW as required by the Endangered Species Act.

(A.R. 16) Based on this reasoning, the court cannot say that the Regional Forester did not consider the relevant factors, or that his judgment was clearly erroneous.[7] *See, Citizens for Environmental Quality, Inc.*, 731 F. Supp. at 983 (applying the Forest Act) (quoting *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416).

The Council raises no further challenges to the 1989 Woodpecker policy.

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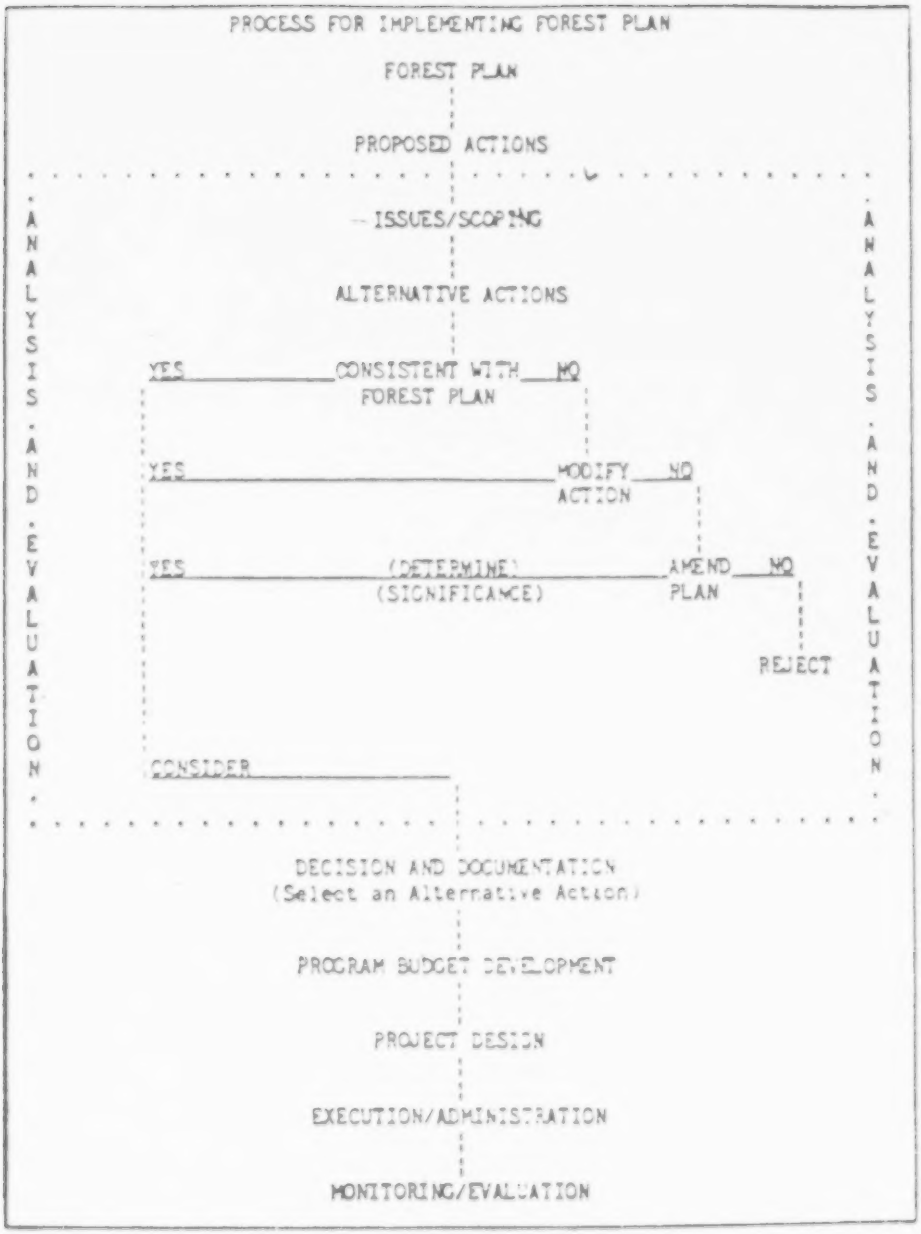
[7] The Council also appears to raise arguments based on the significance of the temporarily lost timber contracts. It is clear, however, that no entitlement to timber exists. *See*, 36 C.F.R. §§ 219.3, 219.16. Plain logic also makes clear that implementation which lowers outputs is not a significant amendment, or indeed any amendment, to the Allowable Sale Quantity set forth in the LRMP, which is merely a ceiling. *See, Id.*

Finally, the Council urges the court to consider the significance of the 1989 Woodpecker policy in light of the superseding policy, to which both parties allude but which neither has produced for the court. In essence, the Council desires the court to rule on these policies together without viewing one of them. This desire must go unsatisfied.

Accordingly, the Council's motion for summary judgment is DENIED, and the Forest Service's cross-motion for summary judgment is GRANTED. All claims in this case having been ruled upon, the Clerk is hereby DIRECTED to enter judgment in favor of the Defendants.

SO ORDERED, this 29th day of July, 1991.

/s/ Orinda D. Evans
ORINDA D. EVANS
United States District Judge


PROCESS FOR IMPLEMENTING FOREST PLAN
FOREST PLAN
PROPOSED ACTIONS
ANALYSIS AND EVALUATION
ISSUES/SCOPING
ALTERNATIVE ACTIONS
YES
CONSISTENT WITH FOREST PLAN
NO
YES
MODIFY ACTION
NO
YES
(DETERMINE) (SIGNIFICANCE)
AMEND PLAN
NO
REJECT
CONSIDER
ANALYSIS AND EVALUATION
DECISION AND DOCUMENTATION
(Select an Alternative Action)
PROGRAM BUDGET DEVELOPMENT
PROJECT DESIGN
EXECUTION/ADMINISTRATION
MONITORING/EVALUATION

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. 1:89-cv-2741-ODE

REGION 8 FOREST SERVICE TIMBER PURCHASERS COUNCIL; HANKINS LUMBER COMPANY, INC.; HOOD INDUSTRIES, INC.; and HUNT PLYWOOD COMPANY, INC.

vs.

JOHN E. ALCOCK, in his official capacity as Regional Forester for Region 8 of the United States Forest Service; F. DALE ROBERTSON, in his official capacity as Regional Director of Region 4 of the United States Fish and Wildlife Service; and MANUEL LUJAN, in his official capacity as Secretary of the United States Department of Interior

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ORDER

[Filed Aug. 8, 1990]

This case under the National Forest Management Act, 16 U.S.C. §§ 1604, *et seq.* ("Forest Act") is before the court on Plaintiffs' motion for reconsideration and on a motion to intervene by the Sierra Club, the Wilderness Society and the National Wildlife Federation ("Sierra Club").

On April 23, 1990, this court ruled on Defendants' motion to dismiss. In that order, the court applied prudential standing limitations to Plaintiffs' claims under the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 ("Environmental Act"), and held that Plaintiffs

did not have standing to assert violations of the Act. The court also deferred ruling on the Sierra Club's motion to intervene. Plaintiffs now move for reconsideration, and the Sierra Club now renews its motion to intervene.

Plaintiffs assert that for the purposes of a motion to dismiss, all material allegations of the complaint must be accepted as true, and the complaint's material allegations need only have a plausible relationship to the policies of the Environmental Act in order to allege standing. According to Plaintiffs, slight public or environmental interests, even economically motivated ones, will suffice for standing. Plaintiffs assert that under these standards, the material allegations of the complaint can be interpreted in no other way than to allow standing. Plaintiffs also assert that the Forest Act is instructive in understanding Einvironmental Act standing, as the Forest Act regulations incorporate some of the Environmental Act's requirements. Plaintiffs maintain that because they have standing under the Forest Act, they must therefore have standing under the Environmental Act. Plaintiffs also contend that they are entitled to standing by virtue of the fact that one employee of the Timber Purchasers Council and one employee of Hunt Plywood Company have filed affidavits stating that their employers have economically motivated interests in woodpeckers. In addition, Plaintiffs themselves assert a general interest in the forests, in the quality of life in towns that depend on the timber industry, and in the quality of their employees' lives and forest related recreation. Plaintiffs thus assert standing due to their corporate desire for information relating to the efficacy of the Forest Service's woodpecker plans and the relation of those plans to the socioeconomic well being of local economies and services. Plaintiffs further advance a "public interest" standing theory by which a party with standing under one statute is purportedly entitled to standing under any other statute. Because Plaintiffs have unchallenged standing under the Forest Act, they maintain that they are entitled to "public interest"

standing under the Environmental Act. Finally, Plaintiffs assert that even if their complaint insufficiently alleges standing, the proper course for this court is to provide Plaintiffs with an opportunity to cure any pleading error.

Defendants respond that Plaintiffs have no basis for reconsideration, and assert that the motion should be denied on that ground alone. Additionally, Defendants assert that the affidavits filed with Plaintiffs' motion for reconsideration confirm that Plaintiffs have only economic motivations, and that without an entirely separate environmental interest, such motivations cannot confer standing under the Environmental Act. Defendants also maintain that Plaintiffs may not assert standing by pointing to the environmental interests of their employees, as none of these employees are plaintiffs in this case, and as the potential harm to employees and local towns is too speculative and remote to support standing. Finally, Defendants assert that Plaintiffs' alleged informational and participational interests are only economically motivated, and therefore do not grant standing.

Reconsideration

Motion for reconsideration are not favored. In general, a motion for reconsideration should not be filed absent new precedent, newly discovered evidence, or manifest error. *See Stamey v. Southern Bell Tel. & Tel. Co.*, 658 F. Supp. 1152, 1154 (N.D. Ga. 1987), *aff'd in part, rev'd in part*, 859 F.2d 855 (11th Cir. 1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 3178 104 L.Ed.2d 1040 (1989); *Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part, rev'd in part*, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988); *Van Ryn v. Korean Air Lines*, 640 F. Supp. 284, 286 (C.D. Cal. 1985). Thus, a motion for reconsideration is not a vehicle for the seriatim presentation of theories that were available when the initial motion was filed, *Lussier v. Dugger*, 1990 U.S.

App. LEXIS 10941, 17-18 (11th Cir. July 2, 1990); *Johnson v. Heckler*, 607 F. Supp. 875, 877 (N.D. Ill. 1984), nor should a motion for reconsideration be used to rehash arguments already made or to refute the court's ruling. *Shields v. Shetler*, 120 F.R.D. 123, 126 (D. Colo. 1988) ("A motion for reconsideration is not a license for a losing party's attorney to get a 'second bite at the apple' by using a word processor to move around the paragraphs from a previously submitted brief, and file a retread of the old brief disguised as a motion for reconsideration."); *Lelsz v. Kavanagh*, 112 F.R.D. 367, 371 (N.D. Tex. 1986). In fact, such actions are clearly sanctionable under Fed.R.Civ.P. 11. *Shields*, 120 F.R.D. at 127.

"[O]nce the ball has ended, the district court has substantial discretion in deciding whether to strike up the band again in order to allow the losing part to argue new material or a new theory." *Appeal of Sun Pipe Line Co.*, 831 F.2d 22, 25 (1st Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). Denial of a motion for reconsideration is therefore reviewed for manifest abuse of discretion. *Id.*; *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 349 (5th Cir. 1989).

Complicating the fact that Plaintiffs have not asserted new precedent or newly discovered evidence in this case is the fact that Plaintiffs' motion was untimely filed.[1] An

[1] Local Rule 220-6 requires parties to file motions for reconsideration "within 10 days after entry of the order or judgment." The court's order of April 23, 1990 was entered on May 2, 1990. Discounting intervening weekends and holidays, ten days from May 2, 1990 is May 16, 1990. Plaintiffs filed their motion for reconsideration on May 21, 1990. Although three extra days for mailing would make Plaintiffs' motion timely, Fed.R.Civ.P. 6(e) only applies when the time for filing runs from the date of service of a document by mail. The entry of an order is not service by mail. Thus, Plaintiffs' motion was untimely. *See In-Tech Marketing, Inc. v. Hasbro, Inc.*, 1989 WL 200990 (D. N.J. Dec. 13, 1989). *Cf., National Sav. Bank of Albany v. Jefferson Bank*, 127 F.R.D. 218 (S.D. Fla. 1989) (denying three days for mailing under Fed.R. Civ.P. 72(a), which requires that objections to a magistrate's

untimely filed motion for reconsideration may be denied on that ground alone. *Smith v. Bounds*, 813 F.2d 1299, 1303 (4th Cir. 1987), *aff'd en banc*, 841 F.2d 77 (4th Cir. 1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 176, 102 L.Ed.2d 146 (1988); *Tomson v. Stephan*, 696 F. Supp. 1407, 1414 (D. Kan. 1988). Nevertheless, in the interests of justice the court reviews for manifest error its decision that Plaintiffs lack standing.

Standing

Contrary to Plaintiffs' assertions, it is not this court's duty to allow Plaintiffs to amend their complaint until they sufficiently allege standing. If further allegations of fact may properly allege standing, it is within the court's power to require Plaintiffs to file such further allegations. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Absent such a situation, however, the court need not engage in gratuitous attempts to cure the complaint's deficiencies. *Citizens Coordinating Committee v. WMATA*, 765 F.2d 1169, 1173 (D.C. Cir. 1985).

Even given Plaintiffs' new allegations, however, Plaintiffs do not meet the requirements for "public interest" standing. According standing to a party who does not even arguably represent the zone of interests sought to be protected by a statute may result in "misuse[] by private commercial interests [and obfuscation] and delay [of] essential federal projects to the real detriment of the very environmental and community interests" sought to be protected by the statute. *Zlotnick v. Redevelopment Land Agency*, 2 ELR 20235, 20236 (D.D.C. 1972), *aff'd*, 494 F.2d 1157 (D.C. Cir. 1972). The "public interest" standing theory recognizes as much by excepting from the court's discretionary power to expand standing cases that do not implement the purposes of the statutes under which standing is asserted, cases that do not improve the

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order be filed within ten days after entry of the order); *Bolger Publications, Inc. v. Graphic Communications International Union*, 601 F. Supp. 207 (D. Minn. 1985) (same).

process of litigation, and cases that will not establish a secure basis for decision. Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d § 3531.16. Because the court has determined that Plaintiffs' interests are not arguably within the zone of interests sought to be protected by the Environmental Act, Plaintiffs are not entitled to "public interest" standing.

As presented by the parties, the core of this motion is whether economically motivated environmental interests confer standing under the Environment Act. To be sure, there are cases on both sides of this issue. *Compare, Realty Income Trust v. Eckerd,* 564 F.2d 447, 452 (D.C. Cir. 1977) ("It is established in [the D.C.] circuit that a party is not 'disqualif[ied]' from asserting a legal claim under NEPA because the 'impetus' behind the NEPA claim may be economic."); *National Helium Corporation v. Morton,* 455 F.2d 650, 655 (10th Cir. 1971) (helium companies have NEPA standing to challenge change in helium policy), *with Hazardous Waste Treatment Council v. U.S. E.P.A.,* 861 F.2d 277, 283 (D.C. Cir. 1988) (hazardous waste treatment firms denied standing for economic claims even though their interests were "in sync" with the interests of the Resource Conservation and Recovery Act), *cert denied,* —— U.S. ——, 109 S.Ct. 3157, 104 L.Ed.2d 1020 (1989); *Port of Astoria, Oregon v. Hodel,* 595 F.2d 467, 475 (9th Cir. 1979) (port alleging loss of tax base and harm to its interests in formulating regulations for preventing stream pollution was denied NEPA standing); *Churchill Truck Lines, Inc. v. United States,* 533 F.2d 411, 416 (8th Cir. 1976) (common carriers with economic interest in preventing competition denied standing under NEPA); *Clinton Community Hosp. Corp. v. Southern Md. Med. Ctr.,* 374 F. Supp. 450, 455 (D. Md. 1974) (hospital denied NEPA standing to challenge construction of competing hospital even though the complaint alleged environmental interests), *aff'd,* 510 F.2d 1037 (4th Cir. 1975), *cert. denied,* 422 U.S. 1048 (1975); *Zlotnick,* 2 ELR at

20236 (land owners not permitted to challenge NEPA violations when their property was condemned by the city). A common sense reading of the complaint, however, reveals not economically motivated environmental interests, but economic interests that only incidentally are affected by the environment.[2]

The complaint alleges that Plaintiffs "are interested in developing RCW strategies which are consistent with forest plans, are scientifically defensible, and do not impose unwarranted restrictions on timber harvesting." Complaint, ¶ 7. Plaintiffs assert that Defendants' actions deprive Plaintiffs of "their rights to information, public participation, and informed decisionmaking; and economically harm them by altering existing timber sale contracts and restricting future timber sales." *Id* Representatives of two of the Plaintiffs maintain that Plaintiffs have: economic interests in stable woodpecker populations that do not interfere with Plaintiffs' steady supply of timber, non-economic environmental interests as representatives of employees who care about the environment, socio-economic interests in the tax bases of timber towns and the services provided by those tax bases, and informational and participational interests in benefitting the woodpecker so that the above interests are served.

To the extent that Plaintiffs have any informational or participational interests, those interests convey standing only to the extent that the uses for the desired information are essential to Plaintiffs' activities and are arguably within the zone of interests sought to be protected by the Environmental Act. *Competitive Enterprise Institute v. NHTSA*, 901 F.2d 107, 122-23 (D.C. Cir. 1990). Of Plaintiffs' interests that would benefit from an evironmental impact statement, the court has already ruled that Plaintiffs' economic interests are proper only in the

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[2] The court has previously held that injuries to Plaintiffs' contractual rights are cognizable only in the Claims Court, and do not confer standing in this case.

Claims Court. It is also well settled that an interest in a tax base is not arguably within the zone of interests sought to be protected by the Environmental Act. *Port of Astoria*, 595 F.2d at 475. Thus, the only remaining issue is whether Plaintiffs are entitled to representational standing based on their employees' interests in forests populated by woodpeckers.

In order to allege standing, a Plaintiff "must generally assert his own rights and not the rights of third parties. . . ." *Chiles v. Thornburgh*, 865 F.2d 1197, 1204 (11th Cir. 1989). Plainitffs, however, may not assert harm to their corporate, aesthetic interest in the woodpecker, as corporations are not deemed to have a sense of aesthetics. *Citizens Coordinating Committee*, 765 F.2d at 1173.

Though an association has standing to bring suit on behalf of its members if the association meets the three requirements set out in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), the parties on whose behalf Plaintiffs would sue are not members of any of the named Plaintiffs. "[S]tanding in representational capacity requires that the representative litigate on behalf of *members* who would have standing in their own right . . . ." *Hope, Inc. v. Count of DuPage, Ill.*, 738 F.2d 797, 814 (7th Cir. 1984). Because the employees alleged to have environmental interests are not alleged to be members of any named Plaintiff, Plaintiffs do not have associational standing.

Although the complaint must be construed in favor of Plaintiffs, *Warth*, 422 U.S. at 501, the court is not required to construe the complaint differently than it is written in order to cure its deficiencies—even on a motion to dismiss for lack of standing. *Citizens Coordinating Committee*, 765 F.2d at 1173. Plaintiffs' complaint alleges Environmental Act standing only if each sentence of the complaint is broken down into its constituent parts and read independently with an eye toward granting

standing. Read as a whole, no common sense reading of Plaintiffs' complaint alleges an environmental interest within the zone of interests sought to be protected by the Environmental Act.[3] "Despite all the references to the environment, it is apparent that plaintiff[s'] real aim is not to improve the quality of life for this and future generations. . . ." *Clinton*, 374 F. Supp. at 455. In fact, the extinction of the red-cockaded woodpecker is more consistent with Plaintiffs' interests in a steady and profit maximizing timber supply than is the perseverance of the species. As such, Plaintiffs are singularly inappropriate representatives of the interests implicated by the Environmental Act. "It is worth remembering that judicial intervention may defeat statutory goals if it proceeds at the behest of interests that coincide only accidentally [if at all] with those goals." *Hazardous Waste Treatment Council*, 861 F.2d at 283.

Intervention

An intervenor as of right must demonstrate: (1) that his application to intervene was timely, (2) that he has a property interest relating to the subject of the action,

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[3] The court notes that by submitting materials outside the complaint, Plaintiffs have constructively converted the motion to dismiss into one for summary judgment. *Marine Coatings of Alabama, Inc. v. United States*, 792 F.2d 1565, 1567 (11th Cir. 1986). While the court views the evidence in a light most favorable to the nonmovant at summary judgment, *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970), "[t]he nonmovant need not be given the benefit of every inference but only of every reasonable inference." *Spence v. Zimmerman*, 873 F.2d 256, 257 (11th Cir. 1989).

It appears from the complaint that Plaintiffs' environmental concerns are little different from those that might be asserted by an association of woodpecker hunters. Such an association might claim the right to participate in environmental decisions that affect the woodpecker by virtue of the association's interest in getting the woodpecker off the endangered species list so that it could be hunted again. While this qualifies as a genuine interest in environmental information, it does not present an interest arguably sought to be protected by the Environmental Act.

(3) that disposition of the action may impair his ability to protect that interest, and (4) that the interest is not well represented by the existing parties. *Chiles*, 865 F.2d at 1213. Sierra Club asserts that it "is the only entit[y] before this Court whose sole interest is the protection and enhancement of the Red-Cockaded Woodpecker." *Memorandum of Sierra Club and the Wilderness Society in Support of Motion to Intervene Pursuant to Fed.R.Civ.P. 24(a)(2)*, pg. 1. Sierra Club further asserts that "disposition of this lawsuit without the participation of proposed intervenors will deny Sierra Club the most meaningful forum in which to assert the need for the protection of the Red-Cockaded Woodpecker." *Id.* at 5. It is obvious, therefore, that Sierra Club's interest in this suit is the protection of the woodpecker. However, with the dismissal of the Environmental and Species Act claims, this suit now concerns the proper procedure for altering the amount of timber that Plaintiffs may cut each year. Sierra Club asserts no interest in securing more timber for Plaintiffs to cut. Thus, Rule 24(a) intervention is improper. Likewise, the court declines to permit intervention under Rule 24(b) on the ground that Sierra Club's unrelated legal claims will unduly delay and complicate this litigation.

Accordingly, Plaintiffs' motion for reconsideration is DENIED and the motions of the Sierra Club, the Wilderness Society and the National Wildlife Federation to intervene are DENIED.

SO ORDERED, this 8th day of August, 1990.

/s/ Orinda D. Evans
ORINDA D. EVANS
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. 1:89-cv-2741-ODE

REGION 8 FOREST SERVICE TIMBER PURCHASERS COUNCIL; HANKINS LUMBER COMPANY, INC.; HOOD INDUSTRIES, INC.; and HUNT PLYWOOD COMPANY, INC.

VS.

JOHN E. ALCOCK, in his official capacity as Regional Forester for Region 8 of the United States Forest Service; F. DALE ROBERTSON, in his official capacity as Regional Director of Region 4 of the United States Fish and Wildlife Service; and MANUEL LUJAN, in his official capacity as Secretary of the United States Department of Interior

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ORDER

[Filed Aug. 8, 1990]

This case under the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.* ("Species Act") and the National Forest Management Act, 16 U.S.C. §§ 1604, *et seq.* ("Forest Act") is before the court on Defendants' motions for summary judgment and for leave to reply to Plaintiffs' supplemental brief.

On April 23, 1990, this court ruled on Defendants' motion to dismiss. Because some of the grounds for the motion to dismiss required reference to material outside the pleadings, the court converted the motion to one for

summary judgment and invited the parties to submit additional evidence. The court also directed the parties to brief the issue of whether Plaintiffs are "applicants" under the Species Act. The parties have now submitted their briefs, and the court considers Defendants' motion on summary judgment.

Defendants' motion is based on three grounds. First, Defendants assert that Plaintiffs' claims regarding the failure of the Forest Service to implement the Woodpecker Handbook fail because Plaintiffs allegedly did not comply with the notice requirements of the Species Act. Second, Defendants assert that Plaintiffs have waived their rights to pursue claims related to the ¾ mile policy because Plaintiffs agreed to modify their contracts subject to the policy. Third, Defendants assert that Plaintiffs' Species Act claims are barred by Plaintiffs' failure to recognizably raise these claims during the administrative proceeding. Defendants also briefed the "applicant' issue as requested by the court. Defendants assert that an "applicant" is defined as any person who requires formal approval before taking action, while action is defined as all activities authorized, funded or carried out by Federal agencies. Defendants assert that only applicants whose action is the subject of consultation are accorded informational and participational rights, and that Plaintiffs' timber cutting was not the subject of the red cockaded woodpecker consultations. Finally, Defendants assert that they have adopted a new woodpecker policy, thereby mooting this controversy.

Plaintiffs respond that a letter dated September 1, 1989 provided the notice required under the Species Act, and that even if that letter was insufficient, the claim should be permitted as an exercise of federal question jurisdiction over a claim for failure to follow the Administrative Procedure Act. Plaintiffs also assert that they have not waived their right to bring Counts II-IV because they did not knowingly and intentionally waive their rights, and

allegedly could not have done so absent a waiver in their modified contracts. Plaintiffs further maintain that any waiver would only be effective against contract claims, not statutory claims. Plaintiffs contend that they raised all their claims at the administrative level, and that even if they did not, exhaustion was not required because it would have been futile and because it is not required under 16 U.S.C. § 1540(g) and 5 U.S.C. § 704. Finally, Plaintiffs assert that the "applicant" issue is irrelevant to standing, and that to the extent the court is focusing on the merits of the "applicant" issue, such consideration is improper before the administrative record has been filed.

Turning first to the "applicant" issue, the court directed briefing of that issue in order to determine if the Species Act claims should proceed any further. If Plaintiffs are not "applicants" under the Species Act, they are not entitled to the informational and participational rights that they assert have been violated. As such, early resolution of this issue might conserve judicial resources.

Addressing the merits of the "applicant" issue, Defendants assert that Plaintiffs are not applicants entitled to informational or participational interests. Without such interests, asserts Defendants, Plaintiffs have no injury and thus no standing under Article III. *Valley Forge College v. Americans United*, 454 U.S. 464, 472 (1982). Plaintiffs, on the other hand, assert that the court has already ruled that informational and participational interests are sufficient for standing under the Species Act. According to Plaintiffs, the standing inquiry should not proceed beyond the allegations of the complaint. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970). Because the complaint alleges informational and participational injuries, Plaintiffs assert that the standing inquiry need proceed no further.

Eleventh Circuit precedent mandates that "we analyze standing questions on a complaint's allegations without considering the litigant's likelihood of success on the

merits." *Federal Deposit Insurance Corporation v. Morley*, 867 F.2d 1381, 1387 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 75 (1989). Nonetheless, a party asserting standing must demonstrate that it has been injured in fact, and "[w]hen standing has been contested, it is the burden of the party claiming standing 'to plead and prove injury in fact, causation, and redressability.'" *E. F. Hutton & Co. v. Hadley*, 1990 U.S. App. LEXIS 8169, 12 (11th Cir. May 21, 1990).

The parties' debate over whether standing is to be resolved based on the face of the complaint or based on the evidence is mostly sound and fury. If Plaintiffs are not "applicants," then they do not have the informational and participational rights that they assert have been violated. Whether this constitutes a lack of injury such that Plaintiffs do not have standing, or whether this is a merits resolution of Plainitffs' Species Act claims, the result is still the same—the Species Act claims would drop out of the suit.[1]

The question of whether Plaintiffs are "applicants" under the Species Act is a mixed question of law and fact. Generally, the administrative record would be required to review such a question. In this case, however, it is clear that Plaintiffs claim "applicant" status by virtue of their logging contracts. The only "applicant" issue, then, is the statutory or regulatory interpretation issue of whether contracting to cut trees qualifies one as an "applicant" under 50 C.F.R. § 402.02. Contrary to Plaintiffs' assertion that resolution of this issue requires the administrative record, "[r]esolution of [a statutory inter-

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[1] Plaintiffs assume that the standing/merits issue affects whether the court must review the administrative record in deciding whether Plaintiffs are "applicants". *See* Plaintiffs' Supplemental Brief, at n.5. Whether the court must review the administrative record, however, depends on whether the question presented is one of law or fact. *Cf. FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986) (courts resolve legal issue in administrative appeals).

pretation] issue does not require the development of a factual record, the application of agency expertise [fn. om.], or the exercise of administrative discretion." *Railroad Yardmasters of America v. Harris,* 721 F.2d 1332, 1338-39 (D.C. Cir. 1983).

Federal agencies must consult with "prospective permit or license applicant[s]" before taking any action that the applicants have reason to believe may affect an endangered species in the area affected by the applicants' projects. 16 U.S.C. § 1536(a)(3).[2] An "applicant" is defined as "any person . . . who requires formal approval or authorization from a Federal agency as a prerequisite to conducting action." 50 C.F.R. § 404.02. At first blush, it would appear that Plaintiffs, by applying for permission to cut trees each year, are prospective license applicants whose project areas contain endangered species that will be affected by the Forest Service's actions.[3] An applicant and the rights to which the applicant are entitled, however, are "[s]ubject to such guidelines as the Secretary may establish." 16 U.S.C. § 1536(a)(3). In establishing the regulations that define the class of applicants that are entitled to consultation, the Secretary specifically excluded therefrom those who may or may not apply for a permit or license in the future and who therefore may wish to consult with regard to regulations governing the issuance of that permit or license. 51 Fed. Reg. 19930 (June 3, 1986). Separate regulations apply to such parties, who may request "early consultation" under 50 C.F.R. § 402.11.

Plaintiffs do not allege that they requested "early consultation" and were denied such. Instead, Plaintiffs allege that they were denied the right to participate in "formal

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[2] The scope of the applicants' rights are defined, inter alia, at 50 C.F.R. § 402.16.

[3] Defendants' argument that the applicant must be taking the action about which the agency is consulting contradicts the express language of 16 U.S.C. § 1536(a)(3) and is therefore rejected.

consultations." As the legislative history of the Species Act makes clear, however, Plaintiffs were not entitled to participate in any "formal consultation."[4] As such, Plaintiffs either do not have standing to raise their claim for failure to enter into formal consultation, or any claim for denial of Plaintiffs' rights to participate in formal consultation fails on the merits—Plaintiffs' Species Act claims are dismissed.

Defendants also move for summary judgment on Claims II-IV of the complaint. Defendants assert that by executing modifications to their timber contracts subsequent to the Forest Service's adoption of the ¾ mile policy, Plaintiffs waived their right to assert any claims arising out of the policy. In support of this proposition, Defendants cite *Metric Construction Co., Inc. v. United States*, 1 Cl. Ct. 383, 396 (1983), which holds that parties who agree to a contract release and fail to exclude certain claims from the release are barred from later raising those claims. First, there was no contract release in this case—there was only a contract modificaton that did not contain terms of release. Second, the rule in *Metric Construction* only bars suits "for damages or for amounts allegedly due under the contract." *H.L.C. & Associates Construction Co. v. United States*, 367 F.2d 586, 590 (Cl. Ct. 1966). Thus, while Plaintiffs' modification of their contracts subsequent to the Forest Service's adoption of the ¾ mile policy claims may, through waiver, estoppel, or ratification, bar Plaintiffs' contract claims, these actions do not bar Plaintiffs' statutory claims. *Cf. International Clinical Laboratories v. Stevens*, 710 F. Supp. 466, 471 (E.D. N.Y. 1989) (estoppel as a contract de-

[4] The legislative history at 1982 U.S. Code Cong. & Admin. News 2807, 2814-15 supports the Secretary's conclusion at 51 Fed. Reg. 19930 (June 3, 1986) that parties such as Plaintiffs are not applicants within the meaning of the statute. The legislative history contemplates specific projects that require approval before completion—not uncertain requests to cut trees such as those Plaintiffs may or may not make in the future.

fense does not bar statutory CERCLA claims). Defendants' motion for summary judgment on the issue of waiver is therefore denied.

Turning to the Defendants' exhaustion of administrative remedies argument, the court finds that exhaustion is not required in this case. "The general rule in this circuit is that a challenge to agency action in the courts must occur subsequent to the pursuit of administrative remedies. . . . [However,] exhaustion is not a jurisdictional doctrine, but one subject to the discretion of the trial court." *Panola Land Buyers Association v. Shuman*, 762 F.2d 1556-57 (11th Cir. 1985).

> [A]n agency has a certain degree of latitude [under § 704 of the Administrative Procedure Act—5 U.S.C. § 704] in determining whether to require an appeal to superior agency authority as a prerequisite for judicial review. Nevertheless, if an agency intends to require an administrative appeal as a prerequisite to judicial review, it must also provide that the agency action be inoperative while the administrative appeal is pending.

Chevron U.S.A., Inc. v. Watt, 564 F. Supp. 1256, 1258 (E.D. La. 1983) In the instant case, the Forest Service has shown no general intent to require exhaustion of administrative remedies other than through this motion. The citizen suit provision of the Species Act, 16 U.S.C. § 1540 (g), does not require exhaustion. The court also finds no purpose in requiring exhaustion at this time. The Forest Service represents that it has already changed its woodpecker policy. As such, remand for exhaustion of administrative remedies would likely prove unavailing. The motion for summary judgment on the issue of exhaustion of administrative remedies is therefore denied.

Finally, Defendants assert that with the adoption of their new woodpecker policy, this case has become moot. In asserting that this case is moot, Defendants bear the

heavy burden of proving both that there is no reasonable expectation that they will in the future harm Plaintiffs by failing to follow the Forest Act's procedures for a "significant" amendment to a forest plan, and that Defendants' adoption of a new woodpecker policy has completely and irrevocably eradicated any harm to Plaintiffs from Defendants' initial failure to follow Forest Act procedures. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

The first prong of this test is not satisfied in that Plaintiffs may reasonably expect that Defendants will significantly alter future forest plans without following Forest Act procedures. In fact, Plaintiffs allege that Defendants did exactly that when they adopted the replacement woodpecker plan without a three month public comment period.[5] The second prong of the mootness test is also not satisfied. Even with the adoption of a new woodpecker plan, Plaintiffs have still been denied the procedure to which they assert they are due. Defendants' adoption of a new woodpecker plan has thus not eradicated Plaintiffs' harm. "[V]oluntary cessation of allegedly illegal conduct . . . does not make the case moot." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Defendants cannot evade review by continuously adopting short term woodpecker plans.

Accordingly, Defendants' motion for summary judgment on the Species Act claims is GRANTED. Defendants' motion for summary judgment on the mootness issue is DENIED. Defendants' motion for leave to reply to Plaintiffs' supplemental brief is DENIED.

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[5] Defendants' argument that this case is moot because the court cannot prevent what has already occurred is therefore rejected. The analysis of *Neighbors Organized to Insure a Sound Environment v. McArtor*, 878 F.2d 174, 178 (6th Cir. 1989) only applies when acts are not "capable of repetition yet evading review". *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

SO ORDERED, this 8th day of August, 1990.

/s/ Orinda D. Evans
ORINDA D. EVANS
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. 1:89-cv-2741-ODE

REGION 8 FOREST SERVICE TIMBER PURCHASERS COUNCIL; HANKINS LUMBER COMPANY, INC.; HOOD INDUSTRIES, INC.; and HUNT PLYWOOD COMPANY, INC.

vs.

JOHN E. ALCOCK, in his official capacity as Regional Forester for Region 8 of the United States Forest Service; F. DALE ROBERTSON, in his official capacity as Regional Director of Region 4 of the United States Fish and Wildlife Service; and MANUEL LUJAN, in his official capacity as Secretary of the United States Department of Interior

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ORDER

[Filed Apr. 23, 1990]

This case under the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.* ("Species Act"), the National Forest Management Act, 16 U.S.C. §§ 1604 *et seq.* ("Forest Act"), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 ("Environmental Act") is before the court on the Sierra Club's motion to intervene, the Defendant's motions for a protective order and to dismiss or in the alternative for a stay, the Plaintiffs' motion for leave to file a supplemental brief, and the Defendants' motion to file a reply to this supplemental brief.

This case arises from the actions of the Region 8 Forest Service in restricting timber cutting within ¾ of a mile of a colony site of red cockaded woodpeckers. The red cockaded woodpecker is considered an endangered species under the Species Act. Through a process of consultation specified in the Species Act and the Forest Act, the Forest Service originally arrived at a plan to manage the red cockaded woodpecker population. That plan was defined in the 1985 Wildlife Habitat Management Handbook ("Woodpecker Handbook"). Plaintiffs allege that sometime in the late 1980s, Defendants discontinued full implementation of the procedures described in the Woodpecker Handbook, and thereafter adopted a new policy to protect the woodpeckers. Defendants assert that their new policy was in response to reports of unstable or declining woodpecker populations. In any event, on March 27, 1989 and then again on June 26, 1989, the Forest Service adopted a new "Policy on Cutting Within ¾ Mile of RCW Colonies On Existing Timber Sale Contracts."

Plaintiffs, a group of timber purchasers, assert that Defendants' new timber policy violates their economic, informational, and public participation rights under the Species Act, the Forest Act, and the Environmental Act. Specifically, Plaintiffs assert that Defendants failed to comply with § 7(a)(2) of the Species Act by not entering into "consultation" with the Fish and Wildlife Service before altering a policy approved by formal consultation and affecting an endangered species. Plaintiffs also assert that Defendants violated the Forest Act and its implementing regulations by failing to obtain an Environmental Impact Statement before "significantly" altering a forest plan and by failing to allow for a period of public review of the new plan. Finally, Plaintiffs assert that Defendants violated the Environmental Act and its implementing regulations by failing to issue an Environmental Impact Statement or Environmental Assessment prior to adopting the new ¾ mile policy.

The Motion to Dismiss or For a Stay

Defendants move to dismiss based on seven grounds. First and foremost, Defendants assert that under the Contract Disputes Act, 41 U.S.C. §§ 601, *et seq.*, Plaintiffs' claims are subject to the exclusive jurisdiction of the United States Claims Court. Second, Defendants assert that to the extent Plaintiffs are claiming rights to future timber sales, they fail to state a claim due to the fact that timber sales are completely discretionary. Third, Defendants assert that Plaintiffs' claims regarding the failure of the Forest Service to implement the Woodpecker Handbook should be dismissed because Plaintiffs failed to comply with the notice requirements of the Species Act. Fourth, Defendants assert that Plaintiffs do not have standing to bring their Species Act and Environmental Act claims because Plaintiffs' injuries are not even arguably within the zone of interests sought to be protected or regulated by these statutes. Fifth, Defendants assert that Plaintiffs have waived their rights to pursue claims related to the ¾ mile policy because Plaintiffs agreed to modify the contracts that were subject to the policy. Sixth, Defendants assert that Plaintiffs' Species Act claims are barred by Plaintiffs' failure to recognizably raise these claims during the administrative proceeding. Finally, Defendants would have this court dismiss or stay these proceedings in light of the impending new Forest Service Guidelines.

Plaintiffs respond that this is not a contract action subject to the Contract Disputes Act. Rather, assert Plaintiffs, the focus of this action is the alleged statutory violations of the Species Act, the Forest Act, and the Environmental Act. With regard to the claim for lost future timber sales, Plaintiffs assert that they have made no such claim, but that the Forest Service's alleged "covenant" to sell timber and the decreased future timber sales that the ¾ mile policy necessarily involves serves as support for their claims of statutory violations. Plaintiffs further maintain that a letter dated September 1,

1989 provided the notice required under the Species Act, and that even if that letter was insufficient, the claim should be permitted as an exercise of federal question jurisdiction over a claim for failure to follow procedures under the Administrative Procedure Act. Plaintiffs also assert that they have standing to assert their Species Act and Environmental Act claims. According to Plaintiffs, the economic harm they have suffered and the denial of their informational and participational rights satisfy the Article III requirement of injury traceable to illegal conduct that can be redressed by order of this court. Plaintiffs also contend that the prudential standing test does not apply to the Species Act, and that even if it does apply, Plaintiffs have prudential standing due to the "legal wrong" they have allegedly suffered from the change in their timber contracts, due to the manner in which the Species Act "regulates" Plaintiffs' businesses, and due to the alleged denial of Plaintiffs' informational and participational rights. Plaintiffs reject Defendants' waiver-of-rights theory on the ground that no rights were intentionally and knowledgeably waived, and allegedly could not have been waived without language in their contracts to that effect. Plaintiffs also maintain that they raised all their claims at the administrative level, and that even if they did not, exhaustion was not required because it would have been futile. Finally, Plaintiffs assert that this case is not moot, and will not become moot because the Forest Service plans to change its policy as: (1) the new Guidelines allegedly will not eradicate the pre-1990 effects of the current policy on timber cutting, (2) the new policy will be temporary and will allegedly be issued without an environmental impact statement, and (3) the alleged practice of denying informational and participational rights will still exist and be capable of repetition.

The court addresses the grounds for dismissal seriatim. The way they are pled, Plaintiffs' claims are not subject to the exclusive jurisdiction of the Claims Court. Al-

though the Contract Disputes Act eliminated "U.S. district court jurisdiction . . . from Government contract claims", S.Rep. No. 1118, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 5235, 5244, Plaintiffs' carefully pled complaint does not allege contract claims. Unlike the Plaintiffs in *Management Science America, Inc. v. Pierce*, 598 F. Supp. 223 (N.D. Ga. 1984), *aff'd*, 778 F.2d 792 (11th Cir. 1985), Plaintiffs in this case assert statutory causes of action and seek remedies that are separate from any potential contract claims. Given the rights that Plaintiffs allege they seek to enforce, Plaintiffs' claims are not within the exclusive jurisdiction of the Claims Court. *See North Side Lumber Co. v. Block*, 753 F.2d 1482, 1485-86 (9th Cir. 1985), *cert. den.*, 474 U.S. 919 (1985); *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 971 (D.C. Cir. 1982); *National Helium Corporation v. Morton*, 455 F.2d 650, 654 (10th Cir. 1971).

Defendants' second ground for dismissal, that Plaintiffs have no right to future timber sales, is moot. Plaintiffs have not asserted a claim for denial of future timber sales and would not be able to assert such a claim in this court.

Defendants' fourth ground for dismissal is that Plaintiffs do not have standing to sue under the Environmental Act and the Species Act. In order to have standing to bring this action, Plaintiffs must meet the minimal Article III requirement of personally suffering an actual or threatened injury due to Defendants' allegedly illegal conduct. Plaintiffs' injury must be fairly traceable to Defendants' actions and redressable by order of this court. *Valley Forge College v. Americans United*, 454 U.S. 464, 472 (1982). In addition, Plaintiffs must meet whatever prudential standing requirements the courts have imposed on parties suing under the Environmental Act or the Species Act.

Plaintiffs maintain that they have established injury under Article III by asserting the loss of timber volume under their current contracts, the loss of future timber volume, and the increased timber harvesting costs incident to Defendants' 3/4 mile policy. These injuries, however, are injuries to Plaintiffs' contractual rights. As Plaintiffs' carefully pled complaint recognizes, in order for this court to exercise jurisdiction over Plaintiffs' claims, the claims must be based on noncontractual injuries. Because the violation of any "right" to steady timber volumes and costs can only arise out of the Forest Act or Plaintiffs' contracts, Plaintiffs may not allege these contractual injuries to establish standing under the Environmental Act or the Species Act. *Spectrum Leasing Corp. v. United States*, 764 F.2d 891, 894 (D.C. Cir. 1985); *Megapulse*, 672 F.2d at 968-69; *Management Science*, 598 F. Supp. at 226. Thus, the only injuries asserted by Plaintiffs that may confer standing under the Environmental Act and the Species Act are Plaintiffs' alleged interests in "maintaining stable [woodpecker] populations and following scientifically defensible [woodpecker] strategies" and the alleged denial of Plaintiffs' "informational and participational interests". Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, pg. 26.

With regard to the Environmental Act, it is clear that Plaintiffs' environmental, information, and participational interests fail to satisfy the prudential standing requirements imposed by the courts. "[A] right to specific information under [the Environmental Act] has so far been recognized for standing purposes only when the information sought relates to environmental interests that [the Environmental Act] was intended to protect. . . . [The Environmental Act's] concern is to inform other governmental agencies and the public about the environmental consequences of its proposed activities, not to inform them about all possible consequences of an agency's action." *Competitive Enterprise Institute v. National High-*

way Safety Traffic Administartion, 1990 U.S. App. LEXIS 720, 45-46 (D.C. Cir. Jan. 19, 1990); *see also, Organized Fishermen of Florida v. Watt*, 590 F. Supp. 805, 815 (S.D. Fla. 1984), *aff'd* 755 F.2d 1544 (11th Cir. 1985), *cert. den.*, 476 U.S. 1169 (1986). In the instant case, "plaintiff[s'] interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit" under the Environmental Act. *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987)[1].

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[1] Plaintiffs assert that they have "regulated industry" standing under the Environmental Act. However, no actions taken under the authority of the Environmental Act restrict Plaintiffs' right to cut trees, nor does the Environmental Act itself restrict that right. Thus, Plaintiffs are not regulated under the Environmental Act.

Even if Plaintiffs were regulated under the Environmental Act, however, Plaintiffs' only claim would be in the claims court. Plaintiffs' only claim would be in the Claims Court. Plaintiffs assert that they are regulated in the sense that the amount of timber they are permitted to cut under their timber contracts has been reduced, while the cost of cutting this timber has been increased. This is clearly nothing more than an attempt to get into this court a complaint that is proper only before the Claims Court. To the extent that Plaintiffs' claim are based on their contracts, the claims belong in the Claims Court. *See Megapulse*, 672 F.2d at 968-69; *Management Science*, 598 F. Supp. at 226.

Plaintiffs also assert that their right to steady future harvesting costs and their right to have a certain amount of timber offered for sale in the future has been regulated by the 3/4 mile policy. Plaintiffs, however, have no right to steady harvesting costs, *cf. Georgia Pacific Corporation v. County of Mendocino*, 357 F. Supp. 380 (N.D. Cal. 1973) (counties may tax timber companies' possession of timber within the county), *aff'd sub nom, International Paper Co. v. County of Siskiyou*, 515 F.2d 285 (9th Cir. 1974); *Sierra Club v. Hardin*, 325 F. Supp. 99, 120 (D. Alaska 1971) (Secretary may condition export of timber from Alaska on primary manufacture within Alaska), nor do they have "a right to harvest timber from the [Region 8] National Forest. No such right is conferred by statute or regulation." *Intermountain Forest Industry Association v. Lyng*, 683 F. Supp. 1330, 1340 (D. Wyo. 1988). Plaintiffs' argument that 16 U.S.C. § 1604(i) gives them

With regard to Plaintiffs' standing to sue under the Species Act, the court finds that Plaintiffs' informational and participational interests meet the minimal requirement of Article III [2]. This does not end the inquiry, however. The court must also determine whether the prudential standing test applies under the Environmental Act and, if it does, whether Plaintiffs meet the requirements of that test.

The Eleventh Circuit has not spoken directly on this issue. Eighth Circuit precedent, however, clearly does not require plaintiffs to meet prudential standing requirements for claims asserted solely under the Species Act. *Defenders of Wildlife, Friends of Animals v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988). In *Defenders* the Eighth Circuit reasoned that because the Species Act provides

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a right to steady future timber volumes proves too much. If Plaintiffs have such a right, it would extend to violations of current land plans and current contracts. As discussed above, Plaintiffs may not obtain an injunction against such harms. Furthermore, Plaintiffs' complaints about future timber volumes are nothing more than complaints about future harvesting contracts. Again, such complaints belong in the Claims Court.

However, even if the Forest Act did confer upon Plaintiffs rights relating to future timber volumes, the Act would only confer the right to steady timber volumes *absent changes that comply with Forest Act procedures*. That right is not injured by Defendants' alleged violation of the Environmental Act. Rather, Plaintiffs have a cause of action under the Forest Act for any such violations.

[2] The Court finds no damage to Plaintiffs' alleged "environmental" interests. Plaintiffs assert an environmental interest "in ensuring stable [woodpecker] populations and scientifically defensible, consistent [woodpecker] management strategies . . . [because s]ound [woodpecker] management today will prevent greater conflicts between [woodpecker] maintenance and timber harvesting in the future." Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, pg. 7. This is akin to saying that Plaintiffs desire to protect the woodpecker in order to get it off the endangered species list so that they can destroy its environment. To make the argument is to admit the lack of a genuine environmental interest. This alleged "environmental" interest is not a cognizable injury under Article III.

that "any person may commence a civil suit on his own behalf—to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the Species Act] or regulation issued under the authority thereof", 16 U.S.C. § 1540(g)(1)(a), Congress thereby "eliminate[d] the prudential limitations by legislation." *Defenders* at 1039. *See also, National Wildlife Federation v. Coleman*, 400 F. Supp. 705, 710 (S.D. Miss. 1975), *rev'd on other grounds*, 529 F.2d 359 (5th Cir. 1976), *cert. denied*, 429 U.S. 979 (1976)[3].

By way of contrast, the District of Columbia Circuit has applied the prudential standing test to suits brought under the Species Act on several occasions. *See, e.g., Humane Society of the United States v. Hodel*, 840 F.2d 45, 61 (D.C. Cir. 1988); *National Audubon Society v. Hester*, 801 F.2d 405, 407 n.2 (D.C. Cir. 1986); *but see, Competitive Enterprise Institute*, 1990 U.S. App. LEXIS at 29-30 (holding that a provision of the Energy Policy and Conservation Act of 1975 that allowed suit by "any person who may be adversely affected by" certain standards demonstrated a Congressional intent to eliminate prudential standing limitations). Likewise, the Eighth Circuit in *Defenders* and the District Court in *National Wildlife* both recognized that when Species Act violations are governed by the Administrative Procedure Act prudential standing limitations apply [4].

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[3] The District Court opinion in *National Wildlife* states that prudential standing is not required for suits filed under the Species Act. The Fifth Circuit, in reversing the District Court, assumed that standing existed without commenting on the prudential standing question. However, because the District Court found that prudential standing existed under the Administrative Procedure Act, the appellate version of *National Wildlife* does not establish a rule in this circuit that forbids courts from applying prudential standing requirements to suits filed under the Species Act.

[4] Plaintiffs suing under the Administrative Procedure Act must allege "injury . . . to an interest 'arguably within the zone of inter-

Supreme Court precedent in this area is confusing. On the one hand, *Bread Political Action Committee v. F.E.C.*, 455 U.S. 577, 584-84 (1982) seems to indicate that standing limitations will be applied absent a clearly expressed Congressional direction to the contrary. On the other hand, *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987) "recognize[s] the presumption in favor of judicial review of agency action", and requires Congress' intent to preclude judicial review be "fairly discernible in the statutory scheme." Without attempting to resolve this apparent controversy, the court simply refers to authority holding that, even under the higher *Bread* standard, language such as that in the citizen suit provision of the Species Act "clearly removes the judicial authority to create prudential barriers by granting review of agency action to" any person. *Center for Auto Safety v. N.H.T.S.A.*, 793 F.2d 1322, 1337 (D.C. Cir. 1986); *see also, Defenders*, 851 F.2d at 1039; Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 255-56 (1988). Thus, Plaintiffs have standing to assert any existing informational and participational claims under the Species Act.

Resolution of whether Plaintiffs qualify as "applicants" such that they enjoy the informational rights described at 16 U.S.C. § 1536(b)(3) and (4) and the participational rights described at 50 C.F.R. § 402(14)(d) requires reference to facts and/or documents outside the complaint. Likewise, resolution of Defendants' third [5], fifth [6],

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ests to be protected or regulated' by the statutes that the agencies were claimed to have violated", *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

[5] Defendants' third ground for dismissal is that Plaintiffs may not raise claims regarding Defendants' alleged failure to follow the Woodpecker Handbook because of Plaintiffs' failure to provide notice of such violations.

[6] Defendants' fifth ground for dismissal is that Plaintiffs, by voluntarily modifying their contracts after the Forest Service

and sixth [7] grounds for dismissal also requires reference to facts and/or documents outside the complaint. "Whether [a party] fail[s] to state a claim for which relief can be granted must be ascertained solely from the face of the complaint." *Marine Coatings of Alabama, Inc. v. United States*, 792 F.2d 1565, 1567 (11th Cir. 1986). If the court considers matters outside the complaint, the motion is constructively converted to one for summary judgment. *Id.* "[B]efore a motion to dismiss may be converted to one for summary judgment the court must first communicate its intention to the parties to so treat the motion and then allow the parties ten days to submit any relevant evidence and argument in support or opposition to the merits." *Id.* at 1568. The parties are therefore directed to submit any relevant evidence and argument within ten (10) days of the date of entry of this order. The Clerk of the Court will resubmit this file after that time for summary judgment consideration of the notice, waiver, and exhaustion issues, as well as the issue of whether Plaintiffs are "applicants" within the meaning of the Species Act.

Defendants' final ground for dismissal or a stay is that Defendants will, by the time this order is entered or shortly thereafter, have adopted new woodpecker guidelines that will moot this controversy. At best, this would be grounds to stay the case. Certainly this case is not now moot because Defendants may at some unidentified time in the future adopt a policy that Plaintiffs will not find objectionable. Nor should the court stay this case until Defendants' new policy is announced. "[V]oluntary cessation of allegedly illegal conduct . . . does not make the case moot." *United States v. W.T. Grant Co.*, 345

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adopted its 3/4 mile policy, waived their rights to sue over this policy.

[7] Defendants' sixth ground for dismissal is that Plaintiffs failed to exhaust their administrative remedies with regard to several of their claims.

U.S. 629, 632 (1953). The case becomes moot only if Defendants fulfill their heavy burden of establishing that the alleged violation is reasonably likely not to recur and the events that are alleged to have made the action moot have "completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Given that this case concerns an alleged deprivation of informational and participational rights, it would appear that no action on the part of Defendants could eradicate the effects of the deprivation. However, even if the effects could be eradicated, Plaintiffs allege that the new interim guidelines suffer many of the same procedural defects as the previous guidelines. Thus, Defendants have not met their burden of establishing that Plaintiffs will not, in the future, be denied informational and participational interests.

The Motion to Intervene

The Sierra Club's motion to intervene is deferred until the Forest Service's new woodpecker policy is adopted. This action began as a case that required the balancing of competing interests in a way that would avoid the extinction of the red cockaded woodpecker. The Sierra Club's interest in the well being of the red cockaded woodpecker thus provided common questions of law and fact that could be fairly resolved in conjunction with this lawsuit. At this point in the litigation, however, the case has been narrowed to focus on the alleged denial of Plaintiffs' informational and participational rights under the Forest Act and the Species Act. As such, there is the possibility that the Sierra Club's intervention will raise extraneous issues and cause undue delay or prejudice. The Sierra Club's motion for a stay hints at such by requesting a stay until Defendants establish a new woodpecker policy, at which time "[i]t is probable that Sierra Club will have new claims against the Forest Service." It is unclear whether these "new claims" will "unduly de-

lay or prejudice the adjudication of the rights of the original parties." Fed.R.Civ.P. 24(b). Thus, the court defers ruling on the Sierra Club's motion to intervene until the Forest Service adopts a new woodpecker policy. The Sierra Club is directed to inform the court when that time has passed.

The Motion for a Protective Order

Defendants also move for a protective order prohibiting Plaintiffs' discovery. Defendants assert that because this court must review the administrative record under an arbitrary and capricious standard, no discovery is permitted, and particularly no discovery is permitted that focuses on issues outside the administrative record.

Plaintiffs respond that their discovery requests are not burdensome, and are only directed at simplifying the issues and insuring that the complete administrative record is filed. Plaintiffs assert that Defendants are not immune from discovery, and that discovery aimed at ascertaining whether the complete administrative record has been filed is appropriate.

Defendants reply that discovery aimed at ascertaining whether the complete administrative record has been filed is improper until after the record has been filed. According to Defendants, only after the record is filed and the court has determined that it is insufficient may action be taken to supplement the record. Defendants further assert that the "contemporaneous construction" exception to the rule that discovery is not to be had in administrative review cases does not apply because Plaintiffs' discovery is directed at the application of a regulation, rather than the construction of the regulation.

The general rule in administrative review cases is that, absent certain exceptions, discovery is not permitted. *Public Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (enumerating certain exceptions to "the

general rule that agency actions are to be judged on the agency record alone, without discovery."). *See also, Joseph G. Moretti, Inc. v. Hoffman*, 526 F.2d 1311, 1312 (5th Cir. 1976). Plaintiffs' requested discovery seeks to elicit the complete administrative record and the basis for certain decisions that undoubtedly will be reflected in that record. Until the administrative record has been submitted, the discovery sought by Plaintiffs is premature and possibly duplicative.

Accordingly, Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART, and the parties are DIRECTED to submit, within ten (10) days of the date of entry of this order, any evidence and/or argument they deem necessary for resolution of the issues to be decided on summary judgment. The Clerk of the Court is DIRECTED to resubmit the file after that time. Defendants' motion for a stay is DENIED. The Sierra Club's motion to intervene is DEFERRED, and the Sierra Club is DIRECTED to inform the court in writing, within twenty (20) days of the Forest Service's adoption of a new woodpecker policy, of any new claims that it may have. Defendants' motion for a protective order is GRANTED, with leave for Plaintiffs to move for specific discovery should such be warranted after submission of the administrative record. Plaintiffs' motion for leave to file a supplemental brief is DENIED and Defendants' motion to reply to the supplemental brief is DENIED.[8]

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[8] The court directs the parties' attention to Local Rule 220-1(b)(2), which states that while "a reply by the movant shall be permitted, it shall not be necessary for the movant to file a reply as a routine practice." The Rule also directs that "[n]o further briefs may be filed by the parties, except upon order of the Court." Thus, while a reply is not favored, the movant is permitted to file a reply when it deems one to be necessary. By way of contrast, more than a party's sense of necessity is required before a surreply or further brief is permitted. In the instant case, the facts and law are not so unusually complicated that further briefing is required for clarification.

SO ORDERED, this 23d day of April, 1990.

/s/ Orinda D. Evans
ORINDA D. EVANS
United States District Judge

APPENDIX F

UNITED STATES DEPARTMENT OF AGRICULTURE

FOREST SERVICE

Washington Office
12th & Independence SW
P.O. Box 96090
Washington, D.C. 20090-6090

Reply To: 1570-1 (TM)
NFS 89-13-00-0136

Date: October 25, 1989

Ms. Deborah B. Baker
Director, Southern Regional
National Forest Products Association
2900 Chamblee Tucker Road, Building 5
Atlanta, Georgia 30341

CERTIFIED MAIL R.R.R.

Dear Ms. Baker:

On July 12, 1989, the Chairman of the Region 8 Forest Service Timber Purchasers Council, Mr. Tommy Thompson, filed an appeal of the Southern Regional Forester's June 26, 1989, decision to continue implementation of the "Policy on Cutting Units within ¾ mile of red-cockaded woodpecker (RCW) Colonies on Existing Timber Sale Contacts" that applies to several National Forests in Region 8. In the Statement of Reasons, Mr. Thompson requested that all future correspondence and responses regarding this appeal be directed to you.

In its appeal, the Region 8 Council requested a stay of this decision as it applies to the preparation of new timber sales. On July 25, 1989, that request for a stay was denied.

On July 21 and July 31, 1989, the Sierra Club Legal Defense Fund and National Wildlife Federation, respec-

tively, requested intervenor status pursuant to 36 Code of Federal Regulations (CFR) 217.14. On August 8, 1989, their requests for intervenor status were granted.

Background

The red-cockaded woodpecker (RCW) is listed as an endangered species pursuant to the Endangered Species Act. The RCW's range is throughout the Southern Region of the National Forest System. Since 1985, the Southern Region has required management for the RCW in accordance with its RCW chapter in the Forest Service Wildlife Habitat Management Handbook FSH 2609.23R (chapter 420). On March 27, 1989, in response to information gained from up-dated inventories that indicated that RCW populations on several National Forests were unstable or declining, the Southern Regional Forester established a "Policy on Cutting Within ¾ mile of RCW Colonies on Existing Timber Sale Contracts." The Policy applies to all National Forests in the Region with RCW populations of 250 or fewer active colonies. The Policy "supplements the Wildlife Habitat Management Handbook Chapter on the RCW . . . to add new protection measures determined necessary to ensure that any action authorized, funded, or carried out by the Forest Service is not likely to jeopardize its continued existence." Existing timber sale contracts, advertised sales, and proposed sales within ¾ mile of RCW colonies were affected by the Policy. The Policy indicated that two steps would follow. Interim Guidelines would apply to future sales and currently advertised and proposed sales withdrawn by the Policy. These guidelines would be in effect until amendment of the Regional Guide in 18 to 36 months.

On March 31, the Region 8 Forest Service Timber Purchasers Council appealed the Regional Forester's decision to issue that Policy, alleging violations of the National Environmental Policy Act, the National Forest Management Act, the Administrative Procedures Act, and contending that the Forest Service has ignored its commit-

ment to its plans. On April 14, 1989, Deputy Chief Overbay held that as the Regional Forester's decision was not documented in a Decision Memo, Decision Notice, or Record of Decision, the decision was not appealable under current regulations (see 36 CFR 217.3 (a)(1)). The Deputy Chief directed the Regional Forester to:

> "conduct an environmental analysis and then prepare the appropriate decision document for the policy regarding cutting near RCW colonies on existing sales and to issue the decision document as soon as possible. The decision document must include a reference to the consideration of compliance with the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and the National Forest Management Act (NFMA) in establishing this policy. The decision document will be subject to administrative appeal under 36 CFR Part 217."

On June 26, 1989, the Regional Forester issued an Environmental Assessment, Finding of no Significant Impact and Decision Notice wherein the Regional Forester documented the rationale and environmental effects of the March 27, 1989, policy, concluded that there would be no significant environmental impacts from the Policy, and decided to continue implementation of the Policy. This appeal followed on July 12, 1989.

Issues

Appellant raises the following contentions:

1. The March 27, 1989, Policy and June 26, 1989, Decision Notice violate the requirements of the National Environmental Policy Act, relevant Council on Environmental Quality (CEQ) guidelines, and Forest Service procedures under NEPA."

2. The March 27, 1989, Policy and June 26, 1989, Decision Notice violate the Administrative Procedures Act."

3. The March 27, 1989, Policy and the Regional Forester's June 26, 1989, Decision Notice violate the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976, the Agency's implementing procedures at 36 CFR Part 219, and direction contained in the Forest Service Manual and Handbook."

4. The treatment of Forest Plan outputs in the June 26, 1989, Decision Notice is inconsistent with recent Forest Service and Secretary of Agriculture Policy concerning the importance of these outputs."

5. The Forest Service's assertion that immediate implementation of the Policy 'Is necessary to protect the RCW as required by the Endangered Species Act' is fraught with errors of fact, or, alternatively, involves significant violations of the Endangered Species Act."

As relief, appellant request that the Region 8 RCW Policy be remanded to the Regional Forester for development, with full public participation, of Forest Plan amendments and implementation procedures that comply with NEPA, Administrative Procedures Act, and the ESA.

Summary of Decision

We affirm the decision of the Regional Forester to continue implementation of the Policy.

Discussion

Before we discuss each of the appellant's contentions, it must be understood that the decision under review here is not the March 27, 1989, Policy but the June 26, 1989, decision to continue its implementation. As we stated in our April 14, 1989, decision responding to appellant's earlier appeal, the March 27, 1989, decision to implement the Policy was not appealable. The June 26, 1989, decision does not change this fact.

1. The March 27, 1989, Policy and June 26, 1989, Decision Notice violate the requirements of the National Environmental Policy Act, relevant Council on Environmental Quality (CEQ) guidelines, and Forest Service procedures under NEPA."

Appellant contends that NEPA was violated because the Forest Service acted upon the March 27, 1989, Policy prior to the development of the NEPA documents.

While the Deputy Chief's April 14, 1989, letter required the Regional Forester to undertake a NEPA analysis, it did not require the Regional Forester to stay the implementation of the Policy during the analysis. We believe this action was appropriate. As the NEPA documentation showed, continuing the Policy preserved the environmental status quo—that is, trees were left standing—while the Region considered the environmental effects of continuing the Policy or resuming timber sales. This is not a situation as in the cases cited by appellant, where resources were irretrievably and irreversibly committed before or while the Agency conducted a NEPA analysis. To the contrary, resources were preserved during the deliberation.

Appellant's approach turns NEPA on its head. Appellant would have NEPA force an Agency to continue a potentially harmful practice whenever it proposed to stop the practice. It defies logic to conclude that the Region should have permitted the harvesting of trees while it was deliberating whether to continue a Policy to preserve them to protect an endangered species. We do not believe that NEPA, the Council on Environmental Quality Regulations, or the Forest Service NEPA procedures require an approach that would have defeated the very purpose of the action under analysis.

Appellant suggests that in carrying out the Policy during NEPA analysis, the Forest Service may have missed the mark in attempting to discharge its responsibilities under

the Endangered Species Act, wasting time and resources and not improving the status of the RCW. It adds that over the long term "the Agency's refusal to conduct an honest NEPA analysis has resulted in a course of action that admittedly 'would have the long-term impact of creating a boom and bust flow of habitat close to colony sites.' "

We agree that the Forest Service needs to carefully consider how to manage for the RCW over the long term. It is clear, however, that such careful consideration will take a long time. The estimate in the Regional Forester's letter to the public dated June 26, 1989, is that it is expected to take 2 years to formulate a sound long-term Policy, through the NEPA process, to aid in the recovery of the species; the Policy suggests the process may even take as long as 36 months. Given the evidence that small populations of the RCW are declining, the Regional Forester was eminently reasonable in recognizing that action must be taken in the meantime so that there will be colonies still in existence to manage in the long term.

As for appellant's suggestion that the Forest Service is implementing a Policy that would in the long-term create a boom and bust flow, the May 3, 1989, Biological Evaluation quoted by appellant explains that if this Policy were a long term one, the boom and bust situation would result. It is clear from the evaluation, however, that this effect would be expected only if the Policy were permanent direction.

Opinions may differ on the appropriate methods for the protection of the RCW, but even appellant must agree that halting clearcutting in the short term does not harm the RCW. We, therefore, disagree that implementation of the Policy during NEPA analysis was counterproductive.

2. The March 27, 1989, Policy and June 26, 1989, Decision Notice Violates the Administrative Procedures Act."

Appellant argues that the Regional Forester's March 27, 1989, Policy and the June 26, 1989, decision notice violated the Administrative Procedures Act (APA) in that these constitute a rule, and APA requirements for rulemaking were not complied with.

We do not agree that the June 26, 1989, decision (or the March 27, 1989, Policy, for that matter) is a rule; therefore, APA procedures for rulemaking do not apply. Since enactment of the National Forest Management Act in 1976 Congress, has required that the National Forest System Regions and Forests prescribe management by Forest Plans. The NFMA and its implementing regulations at 36 CFR 219 set out the procedures to follow in establishing and amending direction in Forest Plans and Regional Guides.

Thus, since 1976, the Forest Service has had the choice of using the rulemaking process of the APA or the processes under 36 CFR Part 219 for plan formulation, implementation, and amendment. Direction that is not applicable nationwide but is applicable for specific Forests, such as this direction for RCW, is particularly suited for incorporation into Forest Plans. The Forest Plans for the Forests affected by this Policy already have direction for the management of RCW. It is appropriate for any changes in the direction to be made through the NFMA amendment process. Appellant obviously agrees, as shown in its third contention in this appeal, regarding NFMA compliance which is addressed later in this decision. As the Policy is subject to the NFMA processes, it is not subject to rulemaking processes.

Even were we to agree that rulemaking would have been appropriate, we do not find a violation of APA requirements. In rulemaking, notice must be provided by publication in the *Federal Register*, "unless persons subject thereto . . . have actual notice thereof in accordance with law." 5 U.S.C. 553(b). The notice must include: "(1) A statement of the time, place, and nature of public rule

making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substances of the proposed rule or a description of the subjects and issues involved."

Although there was not publication of the Policy in the *Federal Register*, the record clearly shows that appellant had ample actual notice of the proposed action. Correspondence between appellant and the Regional Forester shows that as early as January 23, 1989, appellant was aware of and had discussed with the Regional Forester the Forest Service's timber management and the RCW in light of the Forest Service's Endangered Species Act obligations. Appellant was able to review a February 22, 1989, Regional Forester's letter regarding suspension of active sales and or deletion and modification of payment units and meet with the Forest Service to comment on it. (See letter from Chris Barneycastle, Director of Forest Resources, Region 8 Forest Service Timber Purchasers Council, to Regional Forester John E. Alcock, February 27, 1989, and letter from Deborah B. Baker, Southern Regional Director, Region 8 Forest Service Timber Purchasers Council, to Regional Forester John E. Alcock, March 9, 1989, referring to both the February 22, 1989, decision memorandum and a subsequent March 6, 1989, draft Policy.) Only after a number of meetings and discussions of the Forest Service's intended actions did the Forest Service implement the March 27, 1989, Policy. Therefore, even if the APA 30-day notice requirements applied, we conclude the actual notice was provided appellant well before the June 26, 1989, decision and even more than 30 days before the March 27, 1989, Policy. The Regional Forester, thus, would have met the statute's requirements, see 5 U.S.C. 553(b).

3. The March 27, 1989, Policy and the Regional Forester's June 26, 1989, Decision Notice violate the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management

Act of 1976, the Agency's implementing procedures at 36 CFR sec. 219, and direction contained in the Forest Service Manual and Handbook."

The Council contends that the Regional Forester's amendments of the Forest Plans for the Forests affected by the June 26, 1989, decision violate NFMA and its implementing regulations and direction in his determination that the amendments were not significant, in amending a number of plans in one decision, and by allegedly not complying with public notice requirements.

With regard to the determination of nonsignificance, the Regional Forester's June 26, 1989, decision stated that his finding of nonsignificance is based on the temporary nature of the Policy and the fact that the Policy is limited to existing advertised and proposed sales.

Appellant counters with the charge that timber outputs will be significantly reduced for approximately one-third the planning period (fiscal years (FY) 1989, 1990, and 1991), at a minimum, and that over 1.3 million acres of National Forest land will be affected during this period.

The record shows that the Region is contemplating longer term Region-wide changes in RCW management. The process for doing so, by means of a supplement to the Regional Guide, EIS and amendment of the Regional Guide, is estimated at 18 to 36 months (see Biological Evaluation, May 3, 1989; Environmental Assessment, Finding of No Significant Impact, and Decision Notice, June 26, 1989; Letter from John E. Alcock to Readers (of EA, FONSI and DN), June 26, 1989; March 27, 1989, Policy). It is also anticipated that between the June 26, 1989, decision and establishment of new or modified longer term direction interim guidelines may be put in place, as the above-referenced documents indicate. Regardless of whether the Policy in issue here will be in place for a few months or 3 years, it is clear that it will not be kept in place for the remainder of the planning periods for the Forests affected. It is the starting point

for the process of determining the longer term direction for RCW management but it is not longer term direction itself. In the end, changes in longer term direction for RCW management may entail significant amendments but this nonsignificant change in the Forest Plans is not made significant by such possibilities.

Appellant accuses the Forest Service of segmenting decisionmaking, comparing the multi-step process of achieving a long-term RCW Policy to inappropriate incremental decisionmaking under NEPA. The argument against incremental decisionmaking under NEPA does not apply to NFMA Plan amendments. The environmental analysis requirement of NEPA is designed to force agencies to consider the expected consequences of a proposed action. A Plan, however, is documentation of policy and direction that exists at a given time. The function of a Plan is not to state what may or will be the Policy or direction in the future. When the policy and direction change, a Plan will change. It may be that the end result of a multi-step process will be significant changes in Policy and direction in the Forest Plans. For the present, however, the Plans need only reflect the current policy and direction.

Furthermore, the record shows that the effect of this Policy on the ground is not significant. Appellants' statement that 1.3 million acres are "affected" is misleading. That amount of acreage is within ¾ mile of the 1,181 colonies of the Forests subject to the Policy but the actual acreage affected is only those acres on which timber sales existed or for which sales were advertised or proposed. The Biological Evaluation identifies existing sales on only 5,265 acres within ¾ mile of 180 RCW colonies. Further, the Policy does not forbid cutting completely within ¾ mile of colony sites. The Policy provides for the option of thinning on payment units where clearcutting was halted on existing sales, and the emphasis will be on thinning on those units where clearcut sales had been proposed. Further, the Policy also provided for excep-

tions to the deletion of clearcuts on existing sales where review by the Regional Forester shows that the RCW is not likely to be affected by continuing the sale.

Appellants also identify the reduced volume in the timber sale programs as reason for a significant amendment. The Policy may cause significant impacts on the affected Forests' sale programs in the short term. At this point, however, it is not possible to predict whether the changes in outputs resulting from the Policy will forego the opportunity to achieve outputs in later years. (FSH 1909.12 ch. 5.32 sec. 3(c)). Certainly, whether the Policy will cause the longer term effects that would lead to adjustment of the ASQ for the Forests cannot be determined at this time. It will be appropriate for the later steps in the RCW management process to address this question.

Appellants also contend that the Regional Forester violated planning direction in the Forest Service Manual at FSM 1922 by amending the affected plans all at once instead of amending each separately. While appellant is correct that multi-plan amendments are not referred to in the Manual, there is nothing to prohibit them. There is precedent for multi-plan amendments (see Record of Decision for the Suppression of the Southern Pine Beetle (April 6, 1987); Record of Decision for Vegetation Management in the Coastal Plan Piedmont (February 27, 1989)). We conclude that it was appropriate for the Regional Forester to amend the Plans for the Forests affected by the Policy.

With regard to appellant's argument that the Region did not follow established Agency procedures in amending the Forest Plans, we conclude, as we noted in the APA discussion, that interested and affected persons received actual notice of the Policy well in advance of its implementation, and well in advance of the June 26, 1989 amendment. We conclude that for this Policy, which the Regional Forester reasonably decided required rapid im-

plementation to protect the endangered RCW, the notice given was "appropriate." (36 CFR 219.10(f); FSM 1922.51; FSH 1909.12 ch. 5.32 sec. 4). It has long been our interpretation of the notice requirement of 16 U.S.C. 1604(f)(4) for a nonsignificant change in a Forest Plan that it may be noticed and become effective simultaneously, subject to administrative appeal

Furthermore, the Policy issued on March 27, 1989, indicated that the Plans would be amended. Following NEPA documentation, as required by the NFMA regulation, the Plans were amended on June 26, 1989. We conclude that the Region did not violate the requirements of NFMA, its imlementing regulation, nor the Forest Service Manual or Planning Handbook provisions for amending Forest Plans.

4. The treatment of Forest Plan output in the June 26, 1989, Decision Notice is inconsistent with recent Forest Service and Secretary of Agriculture Policy concerning the importance of these outputs."

Appellant contends the Regional Forester's decision to continue the March 27, 1989, Policy does not square with the statement that Forest Plans should represent a covenant with the public to produce a set of goals and outputs from the National Forests. (USDA Decision on Review of Administrative Decision by the Chief of the Forest Service related to an Administrative Appeal of the Klamath National Forest Supervisor's Notification of the Forest's 1987 Timber Sale Schedule, October 26, 1989.) Apparently, appellant feels that the Forest Service has not taken "very seriously the goals and objectives identified" in the Plans. Appellants also quote the charge in that decision that "[i]f it becomes apparent, during the course of plan implementation, that the goals and outputs cannot be met, the Forest Service has the responsibility to so inform the public, [apprise] them of available options, and solicit their views."

There is no evidence on the record that the Regional Forester had not taken very seriously the goals and objectives identified in the Plans. Had he not taken the goals very seriously, he would not have devoted the considerable effort documented in the record to reach a decision in coordination with both the environmental and industry communities (see letter from Chris Barneycastle, Director of Forest Resources, Region 8 Forest Service Timber Purchasers Council, to Ralph F. Mumme, Forest Service, (January 10, 1989); letter from Chris Barneycastle to John E. Alcock, Regional Forester (January 23, 1989); letter from John E. Alcock to Federico Cheever and Douglas Honnold, Sierra Club Legal Defense Fund (January 31, 1989); Letter from Mark Hughes, Sierra Club Legal Defense Fund, to John E. Alcock and Jean Williams Mellor, Dept. of Justice (February 6, 1989); letter from John Alcock to Douglas Honnold (February 23, 1989); letter from Chris Barneycastle to John E. Alcock (February 20, 1989); letter from Chris Barneycastle to John E. Alcock (February 27, 1989); letter from George Leonard, Associate Chief, to Mark Rey, Vice President, National Forest Products Association (February 27, 1989); letter from Mark Rey to John E. Alcock (March 1, 1989); letter from Deborah B. Baker, Southern Regional Director, Region 8 Forest Service Timber Purchasers Council, to John E. Alcock (March 9, 1989); draft revision of Policy from Mark Rey to Marv Meier, Deputy Regional Forester (March 17, 1989); letter from Mark Hughes to Jean Williams Mellor and Marv Meier (March 17, 1989); letter from Marv Meier to Douglas Honnold (March 23, 1989); letters from Marv Meier to Deborah B. Baker, Mary Rey, Chris Barneycastle (March 23, 1989); letter from Deborah B. Baker to John E Alcock (April 21, 1989); letter from Deborah B. Baker to John E. Alcock, (May 18, 1989); March 27 Policy; June 26, 1989, Decision Notice). The actions of the Regional Forester are an excellent example of compliance with the direction quoted above: he "informed the pub-

lic" that the Agency's Endangered Species Act responsibilities required a change in timber management direction, and he "[apprised] them of available options and solicite[d] their views" in correspondence and meetings referred to in the record.

We agree that the Plans's goals and outputs should be taken seriously, and amendments should not be made lightly. However, it was appropriate that the Regional Forester also took very seriously his statutory duty under the Endangered Species Act to ensure that any action authorized by the Forest Service is not likely to jeopardize the RCW (16 U.S.C. 1536(a)). Between timber harvest goals which are not required by statute to be at any specific level and the need to ensure protection of an Endangerd Species pending amendment of the Regional Guide, the Regional Forester made the correct choice.

5. The Forest Service's assertion that immediate implementation of the Policy 'is necessary to protect the RCW as required by the Endangered Species Act' is fraught with errors of fact or, alternatively, involves significant violations of the Endangered Species Act."

Appellant contends that the Forest Service has not justified its Policy with a showing that timber management has adversely affected the RCW. Appellant further contends that the Forest Service and Fish and Wildlife Service violated Section 7 of the Endangered Species Act by not reinitiating formal consultation procedures, and by not including appellant in consultation as an "applicant" under the ESA.

As appellant's Notice of Appeal and Statement of Reasons make clear, there is controversy regarding the course of action to be taken to halt the decline of the RCW and raise its numbers to recovered status. While the record does not indicate that continued clearcutting was certain to jeopardize the RCW, the Region did acknowledge that "clearcutting may be a contributing factor to

the decline of some populations." The Biological Evaluation of the Policy indicates that the Policy provides "emergency measures to try and stabilize [RCW populations with a high risk of extirpation or showing signs of decline] and protect elements of RCW habitat to ensure that options for long term management are not foregone." (Biological Evaluation, Policy on Cutting Within ¾ Mile of RCW Colonies on Existing Timber Sale Contracts; see also the Notice of Intent to Prepare a supplement to a final environmental impact statement, 54 *Federal Register* 19422 (May 5, 1989) which explain the Policy is "designed to protect the RCW and does not foreclose consideration of a reasonable range of recovery management possibilities in supplement to the Regional Guide EIS.")

In the face of small, unstable, and declining RCW populations, the Regional Forester has determined that an amendment to the Regional Guide, to set longer term policy for management of the RCW, is in order. During analysis for amending the Regional Guide, the Forest Service will consider a range of options for management. As the Region recognized, it was appropriate to protect the habitat of this endangered species until such time as careful deliberation through an environmental impact statement and appropriate consultation could show how that habitat should be managed. We conclude that the Regional Forester's decision to halt clearcutting was a correct decision ensuring that the Forest Service not authorize actions likely to jeopardize the endangered RCW.

Appellant further contends that the Forest Service, as well as the Fish and Wildlife Service, violated consultation requirement of the Endangered Species Act (at 16 U.S.C. 1536(a)) and its implementing regulations (at 50 CFR part 402). First, appellant asserts that under the act and regulations, it is an "applicant," and, thus, is entitled to participate in the consultation process. The granting of a contract, appellant points out, is an action under the statute. Further, appellant contends that because the Forest

Service acted upon "new information," reinitiation of formal consultation was required.

We find appellant's characterization of the process leading to the June 26, 1989, decision inapposite, and, thus, we conclude its contentions regarding consultation requirements are without merit. There was new information: the small populations of RCW were found to be unstable or declining. The Regional Forester requested reinitiation of formal consultation on the handbook on September 26, 1988. (See letter from John E. Alcock, Regional Forester, to James W. Pulliam, Jr., Regional Director, United States Department of the Interior (DOI) Fish and Wildlife Service (September 26, 1988).) The Regional Director of the Fish and Wildlife Service responded that informal consultation would be more appropriate given that revisions to the handbook direction were expected to take a number of months. (See letter from John T. Brown, Acting Regional Director, DOI, Fish and Wildlife Service (October 11, 1988.)

Thereafter, the Regional Forester proposed the Policy as a short-term response to the new information. Although consistent with the handbook, the Policy is more restrictive (halting clearcutting within ¾ miles of RCW colonies except in approved exceptions and turning to thinnings within these areas). The Forest Service prepared a biological evaluation on May 3, 1989, and concluded that the Policy was not likely to affect the continued existence of the RCW. (See May 3, 1989, Biological Evaluation on the Policy on Cutting Within ¾ Mile of RCW Colonies on Existing Timber Sale Contracts.) Had the restrictive measures of the Policy been shown likely to adversely affect the RCW, formal consultation would have been required (50 CFR 402.14). As the Biological Evaluation indicated that the Policy was not likely to adversely affect the RCW, the informal consultation was sufficient. On June 15, 1989, the Fish and Wildlife Service concurred that the Policy is not likely to ad-

versely affect the RCW (see letter from James W. Pulliam, Jr. Regional Director, DOI, Fish and Wildlife Service, to John E. Alcock, Regional Forester (June 15, 1989)).

Whether a person is an "applicant" under the ESA implementing regulations depends upon whether that person is to conduct the action in issue. The "action" was the establishment of a Policy for the management of timber within ¾ mile of RCW colonies. It is the Forest Service, not appellant, who has implemented the Policy by cancelling or modifying contracts and withdrawing advertised and proposed sales. Appellent, or rather the purchasers represented by appellant, were certainly affected by the Policy, but they have not carried it out. Therefore, appellant was not an "applicant" under the Endangered Species Act.

Decision:

The Southern Regional Forester's decision of June 26, 1989, to implement the Policy for cutting within ¾ mile of active red-cockaded woodpecker colonies is affirmed.

Forest Service timber management as it affects the RCW has been the subject of much debate over the last few years. It was the focus of an intensive lawsuit in Federal District Court in Texas (*Sierra Club v. Lyng*, Civ. No. L-85-69-CA (E.D. Texas)) and the litigation continues in the Fifth Circuit Court of Appeals. Among the events leading up to the creation of the Policy at issue in this appeal were Notices of Intent to Sue for Violation of the Endangered Species Act by Sierra Club Legal Defense Fund. Ironically, a consequence of the Policy is another Notice of Intent to Sue by appellants. Clearly, how the Forest Service should manage its lands to protect the endangered RCW is by no means a closed question.

While the issue of RCW management is still an open question, the prudent course is that which the Regional

Forester has taken with this Policy. Given the declining and unstable condition of small populations, the first step is to preserve the environmental status quo, and, thus, preserve options for future management.

If the status quo is to be preserved, it is counterproductive to delay its implementation. We can understand the appellant's frustration with the rapid development of this Policy which has adversely affected opportunities to harvest timber on the National Forests. However, given his duties under the Endangered Species Act, the Regional Forester had no choice. Faced with a deteriorating situation, he had to act quickly to preserve the options for future management.

Although the Regional Forester acted quickly, he did provide appellants and others extensive opportunities to participate in the formulation of the Policy. The record in this appeal shows that appellants were given early and continuous opportunities to meet and discuss the proposed Policy. While the process leading up to the June 26, 1989, decision was not typical, we conclude that it was adequate and appropriate to the situation.

To continue controversy on how the Policy was established is to look backward. Already the Regional Forester has proposed interim guidelines for the further management of forest areas surrounding RCW colony sites. He has also begun the scoping process for the amendment of the Regional Guide. It is meaningful to continue the debate over RCW management in the development of these next steps.

Managing for the RCW requires a constant process of acquiring and assessing new information, and adjusting management to reflect the increased knowledge about the species and its needs. This process affords appellant, and all persons interested in the RCW and its management, continuous opportunities to contribute theories and infor-

mation. We encourage appellant to continue to avail itself of these opportunities in the future.

This decision is the final administrative determination of the Department of Agriculture unless the Secretary elects to conduct a discretionary review pursuant to 36 CFR 217.7 (e).

Sincerely,

/s/ David G. Unger
DAVID G. UNGER
Reviewing Officer
Associate Deputy Chief, National Forest System

UNITED STATES DEPARTMENT OF AGRICULTURE

FOREST SERVICE

Washington Office
12th and Independence SW
P.O. Box 96090
Washington, D.C. 20090-6090

Reply To: 1500

Date: April 14, 1989

Mr. Huey Long
Chairman, Region 8
Forest Service Timber Purchasers Council
P.O. Box 1788
Forest Park, Georgia 30051

Dear Mr. Long:

On March 31, 1989, you filed a notice of appeal under 36 CFR 217 regarding the Southern Regional Forester's March 27, 1989, decision regarding regional policy on cutting near Red-cockaded woodpecker (RCW) colonies on existing timber sale contracts. As you noted in your letter, Part 217 regarding the Forest Service administrative appeal regulations became effective on February 22, 1989. However, as you also noted, 36 CFR 217.3 (a) (1) states specifically that "only decisions documented in a Decision Memo, Decision Notice. or a Record of Decision are subject to appeal under this part."

The Regional Forester's letter of March 27, 1989, to certain Forest Supervisors in the Southern Region setting forth the policy for cutting within ¾ miles of RCW colonies on existing timber sale contracts was not predicated on any NEPA environmental analysis or decision. Since the policy established by the Regional Forester was not issued as a NEPA decision, the policy established by the

Regional Forester on March 27, 1989, has not yet become an appealable decision under 36 CFR 217. For that reason, a ruling on the intervention request by the Sierra Club Legal Defense Fund is unnecessary.

The action taken by the Regional Forester was in response to our most recent findings concerning RCW management, and was intended to handle the unique situations regarding existing timber sales with their existing contracts. The policy primarily provides direction for administering these contracts with directions for identifying and prioritizing payment units affected, suspension of operations, modifications under contractual provision BT 8.3, and possible unilateral modification by the Forest Service under CT 6.25#. The policy provided for site-specific actions to be analyzed and appropriate steps taken to comply with NEPA.

Given the wide range of environmental conditions that could be encountered, the various timber sale contractual situations (existing contracts, bid but not awarded, advertised, and proposed), and the need for swift action, the Regional Forester concluded that establishment of this interim policy regarding cutting near RCW colonies without the preparation of NEPA documentation was appropriate. However, we do not agree, and by copy of this letter we direct the Regional Forester to:

> conduct an environmental analysis and then prepare the appropriate decision document for the policy regarding cutting near RCW colonies on existing sales, and to issue the decision document as soon as possible. The decision document must include a reference to the consideration of compliance with the Endangered Species Act, the National Environmental Policy Act, and the National Forest Management Act in establishing this policy. The decision document will be subject to administrative appeal under 36 CFR Part 217. The decision document

will be distributed to individuals or groups on the mailing list for each Forest Plan involved.

The Regional Forester may make changes in this interim policy as he deems necessary. When he finds that adjustments are needed, he should issue the appropriate NEPA decision document.

The Red-cockaded woodpecker is listed as a federally endangered species. Since the development of the southern Regional Guide and the respective Forest Plans, new information has emerged relating to the management of the habitat for this species. After consulting with both the Forest Service Timber Purchasers Council and the Sierra Club Legal Defense Fund, the Regional Forester has deemed it necessary to quickly implement interim measures for the protection of this species, particularly in areas affected by existing timber sale contracts. Accordingly, and in addition to the above, the Regional Forester is directed to:

inform the public through a Federal Register notice of the Regional Forester's intent to amend the Regional Guide and in the notice provide the public with an opportunity to comment on how the Forest Service will comply with the Endangered Species Act, the National Forest Management Act, and the National Environmental Policy Act.

Thank you for your continued interest in the management of the National Forests in the southern Region.

Sincerely,

/s/ David G. Unger (for)
JAMES C. OVERBAY
Deputy Chief

APPENDIX G

UNITED STATES DEPARTMENT OF AGRICULTURE

FOREST SERVICE R8

Reply To: 2430/2670 Date: March 27, 1989

Subject: Policy on Regeneration Cutting/RCW Colonies (Ref. Our 2/22)

To: Forest Supervisor, NFs in Alabama, Kisatchie NF, Ouachita NF, Chattahoochee-Oconee NFs, Cherokee NF, NFs in Florida, NFs in Mississippi, NFs in North Carolina, Daniel Boone NF

REPLY DUE APRIL 28

Enclosed for your implementation, effective this date, is the final "Policy on Cutting within ¾ mile of RCW Colonies on Existing Timber Sale Contracts dated March 23, 1989." This final policy has been coordinated with the Sierra Club and National Forest Products Industry. Revisions include, to the extent possible, your suggested changes and concerns.

We ask you provide us with a brief report by April 28, showing the number of payment units originally needing modification and the number remaining to be completed.

In the event you have any questions, contact the individuals shown under number 8 of the policy.

/s/ Marvin C. Meier (for)
JOHN E. ALCOCK
Regional Forester

Enclosure

cc: Directors
Forest Supervisors

POLICY ON CUTTING WITHIN ¾ MILE OF RCW COLONIES ON EXISTING TIMBER SALE CONTRACTS

MARCH 27, 1989

The purpose of this document is to describe the policy on cutting on existing timber sale contracts within ¾ mile of active and inactive RCW colonies. Existing sale contracts are defined as those which have been awarded or those with award pending. This policy will be implemented within active populations less than 250 active colonies. Active populations which are not affected by this policy are:

1. Francis Marion population
2. Apalachicola population
3. Vernon-Kisatchie-Evangeline population on the Kisatchie NF

This policy establishes new protection measures for the endangered red-cockaded woodpecker determined necessary to insure that any action authorized, funded or carried out by the Forest Service is not likely to jeopardize its continued existence. This policy supplements the Wildlife Habitat Management Handbook (2609.23R FSH) and is based on the most current biological research on the red-cockaded woodpecker. It has been developed in coordination with the Sierra Club Legal Defense Fund and the Region 8 Forest Service Timber Purchasers' Council.

These actions may or may not be consistent with the Forest Plans of the Forests affected. However, the directive will take precedence over standards and guidelines in Forest Plans until such time as the Plans are amended to comply.

Following are the immediate actions which must be completed to implement this policy on existing sales. This policy only pertains to sales involved with suitable RCW habitat (pine and pine-hardwood forest types). Refer to

the Comprehensive Plan for Management of Red-Cockaded Woodpeckers on the National Forests in Texas for definitions of RCW terms used in this policy.

Interim RCW Guidelines are being developed which will supersede the existing RCW Handbook direction for those areas within ¾ mile of RCW Colonies in populations with less than 250 active colonies. The Interim Guidelines for RCW will not be finalized until we consult with USDI. Fish and Wildlife Service, and other interested publics and organizations. When finalized, the Interim Guidelines will apply to future sales and currently advertised or proposed sales that have been withdrawn and will remain in effect until the Region 8 Regional Guide is amended. The amendment of the Regional Guide will start as soon as possible and could take 18 to 36 months to complete.

RCW/Active Sale Policy

1. NOTIFICATION

   In accordance with earlier direction, you should have advised Congressional delegations, affected purchasers, industry, environmental organizations, and the media of the changes which will be made to existing and planned timber sales when this regeneration policy is implemented. If not, you should immediately schedule meetings with these groups to inform them of our efforts to formulate a policy consistent with our statutory responsibility and one that is agreeable to the Sierra Club Legal Defense Fund, the National Forest Products Association and the R-8 Timber Purchasers Council. You should also inform them of the effects of implementation of this policy.

2. AWARDED SALES

   A. Identify payment units (PU) of individual timber sales within ¾ mile zones of active and inactive colonies in which the method of cutting is clearcutting. Include seedtree, shelterwood and seed-

tree shelterwood removal cuts in your analysis. Clearcuts to convert off site pine (slash, loblolly or sand pine) back to longleaf pine are excluded from this policy if RCW habitat would be improved by such conversion. Relicts and one acre or larger inclusions of longleaf pine with 40 BA or greater are to be retained in these conversions.

Prioritize these timber sales according to RCW colony status and distance from colony site:

FIRST PRIORITY—within ¼ mile of an active colony

SECOND PRIORITY—within ¼ to ¾ mile of an active RCW colony

THIRD PRIORITY—within ¾ mile of an inactive RCW colony

B. Using the following evaluation criteria make a decision to either delete the regeneration payment unit (PU) from the timber sale, change the method of cutting to a thinning, or proceed with the planned regeneration. Be sure to reassess the timber sale to ensure compliance with the RCW handbook chapter; consider, for example, recruitment and replacement stands, foraging habitat acre requirements, foraging habitat spatial requirements, or age class distributions based on RCW extended rotations within the ¾ mile zone.

(1) PU WITHIN ¼ MILE OF GEOMETRIC CENTER OF COLONY SITE:

Delete the PU or change method of cut to a thinning. If the method of cut is changed to a thinning, retain at least 60 square feet of pine basal area per acre. The following priorities will be used to select trees for retention:

(a) Relict Trees

(b) Potential cavity trees

(c) Trees 10 DBH+ which are not potential cavity trees

(d) Trees less than 10 inches DBH

(2) PU BETWEEN ¼ AND ¾ MILE OF GEOMETRIC CENTER OF COLONY SITE:

a. PU not in compliance with existing handbook direction—delete the PU.

If in compliance with existing handbook direction see (2)b or (2)c.

b. PU involves a stand that is at or above the applicable RCW rotation (see Table 1 below) —Delete the PU or change the method of cut to thinning, retaining at least 60 square feet of pine basal area per acre. If the method of cut is changed to a thinning, the following priorities will be used to select trees for retention.

Relict Trees
Potential cavity trees
Trees 10 inches and greater DBH which are not potential cavity trees
Trees less than 10 inches DBH

c. PU does not involve stand at or above the applicable RCW rotation (see Table 1 below). Proceed with planned regeneration if an analysis shows that proceeding is not likely to adversely affect RCW habitat. Regional Forester approval will be required in all cases before regeneration harvest may continue. This approval will be based, in each case, on data furnished by Forests as per the attached document entitled "Timber Sale/ RCW Analysis". This data will be considered in light of the following:

Fragmentation
Colony Isolation

Foraging Habitat Continuity
Foraging Habitat Amount
Isolation of Recruitment or Replacement Stands
Age Class Distribution

Prompt notice of any determinations to proceed with regeneration harvest, made under this part, will be sent to the Sierra Club Legal Defense Fund and the R-8 Timber Purchasers' Council by the Regional Forester.

Table 1 RCW Extended Rotation Guide (from FSH 2609.23R)

	Recruitment/Replacement Stand Option in Forest Plan	
Forest Type	With R/R stands	Without R/R stands
yellow pine	70 years or longer	80 years or longer
longleaf pine	80 years or longer	100 years or longer

C. Thinnings in existing sales must be inspected on the ground to determine if relict trees are present. If relict trees are designated for cutting, they must be deleted from the timber sale and protected during harvesting operations. Use the priorities described in 2B(2)b for identifying and protecting trees for retention.

D. Immediately, the contracting officer should notify all affected purchasers by formal letter that FS requests purchaser to suspend all logging operations on the affected payment units (CT6.25#). If purchaser was contacted earlier and a verbal request made, this earlier request should be documented formally in this letter. (Sample notification letter attached).

Following the notification of request to suspend logging operations, immediately begin the process to modify existing contracts to align them with

the policy in the remainder of this letter. Modifications should be completed as soon as possible.

E. Make the maximum possible effort to provide timber for deleted volumes. This can be done by written modification by both parties pursuant to BT8.3. Such modification cannot be injurious to the United States (36 CFR 223.112) and must comply with existing law and policy. If the conditions of the sale, including the value of the timber or operating costs, are substantially changed, a rate redetermination must be made. In certain situations, limited volume may also be available pursuant to 36 CFR 223.80 and 223.85.

In those instances where volume in other areas outside the scope of the original project analysis is substituted for deleted PU's there may be a need to supplement existing environmental documents and issue a new decision in order to comply with NEPA/NFMA. Supplementation and a new decision would be required if the changes are relevant to environmental concerns or there are new circumstances or inforamtion that is relevant to environmental concerns and have a bearing on the proposed action or its impacts. Any new decision will be appealable under 36 CFR 217.

F. If any unilateral contract modification is pursued, it will be made under the authority of CT6.25#, Protection of Endangered Species. Purchaser claims may result from modification of some contracts. These claims should be handled under the Contract Disputes Act and the Contracting Officer.

G. It is highly preferable to modify the contract by mutual agreement under BT8.3 to delete individual payment units. Contracting Officers should strive, to the maximum extent practicable, to modify existing contracts under authority of BT8.3.

H. Some purchasers may choose not to accept the contract modification as proposed. It is acceptable to cancel the contract if the modification changes the sale conditions significantly and the purchaser is unable to recover the original profit margin.

3. AWARD PENDING CONTRACTS

A small number of "award pending" contracts exist. There are two options available for consideration.

a. The preferred alternative is to discuss with the apparent high bidder, the potential to award the sale. If the high bidder, after being presented the alternatives, agrees to a proposed modification, the sale should be awarded and modified to conform to the guidelines in this policy.

b. Or, reject all bids, redesign the sale to conform to the policy in this document and advertise the redesigned sale at a later date.

4. ADVERTISED TIMBER SALES

Effective immediately, withdraw all sales currently advertised if they have regeneration cutting within ¾ mile of an active or inactive RCW colony.

5. PROPOSED SALES

The emphasis in all proposed sales within ¾ mile of all active and inactive RCW colonies will be thinning pine and pine-hardwood stands to a Basal Area range of at least 60 square feet if a high risk of SPB infestation exists. We anticipate an aggressive program in the next few years to achieve this desired condition.

Until the Interim RCW Guidelines are final, only thinning cutting (does not include Virginia and sand

pine) will occur within the ¾ mile zones. Thinning prescriptions will emphasize the retention of those trees most suitable as future RCW nesting habitat. The following priorities will be used to select trees for retention while retaining at least 60 square feet of pine basal area per acre:

(1) Relict trees

(2) Potential cavity trees

(3) Trees 10 inches and greater DBH that are not potential cavity trees

(4) Trees less than 10 inches DBH

There may be exceptions to the described thinning harvest cutting for situations such as understocked stands, damaged stands, conversion of off-site pine back to Longleaf and similar situations. Any such exceptions will be considered on a case-by-case basis using the data and factors described at 2B(2)c and require Regional Forester approval before regeneration harvest may continue. When such exceptions are sought, notice will be sent to the Sierra Club Legal Defense Fund and the R-8 Timber Purchasers' Council.

6. SOUTHERN PINE BEETLE

It is our policy to protect the RCW and its habitat from SPB damage within the ¾ mile zone. When SPB infestations are detected within the ¾ mile zone and control is necessary, the SPB Record of Decision and EIS will be followed with appropriate NEPA compliance on the site-specific project.

7. OTHER

We anticipate some purchasers will be affected to a greater degree by suspension (2D) than other purchasers. Contracting Officers should analyze and proc-

ess affected sales in an order that recognizes individual purchaser needs.

8. TECHNICAL ASSISTANCE

Technical assistance is available from the Regional Office. Contact the appropriate staff listed below for advice and assistance.

Mike Sparks—Sales
Jimmy Walker—Silviculture
Ron Escano—T&E Species
Yvonne Knaebel—NEPA

APPENDIX H

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article III, Section 2, Clause 1:

Subjects of jurisdiction.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * *

The Administrative Procedure Act as revised, 5 U.S.C. §§ 702, 704, 706

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

* * * *

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declara-

tory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

* * * *

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

* * * *

16 U.S.C. § 475

§ 475. Purposes for which national forests may be established and administered

All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

* * * *

The Endangered Species Act, Sections 7(a) and (b), 11(g), 16 U.S.C. §§ 1536(a) and (b), 1540(g)

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statment that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

* * * *

§ 1540. Penalties and enforcement

* * * *

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subpargaraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of

the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of

persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

* * * *

The National Forest Management Act of 1976 as amended, Sections 2, 6, 12, 13, and 14, 16 U.S.C. §§ 472a, 1604, 1611

§ 472a. Timber sales on National Forest System lands

(a) Authorization; rules and regulations; appraised value as minimum sale price

For the purpose of achieving the policies set forth in the Multiple-Use Sustained-Yield Act of 1960 (74 Stat. 215; 16 U.S.C. 528-531) and the Forest and Rangeland Renewable Resources Planning Act of 1974 (88 Stat. 476) [16 U.S.C. 1600 et seq.], the Secretary of Agriculture, under such rules and regulations as he may prescribe, may sell, at not less than appraised value, trees, portions of trees, or forest products located on National Forest System lands.

(b) Designation on map; prospectus

All advertised timber sales shall be designated on maps, and a prospectus shall be available to the public and interested potential bidders.

(c) Terms and conditions of contract

The length and other terms of the contract shall be designed to promote orderly harvesting consistent wth the principles set out in section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended [16 U.S.C. 1604]. Unless there is a finding by the Secretary of Agriculture that better utilization of the various forest resources (consistent with the provisions of the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528-531]) will result, sales contracts shall be for a period not to exceed ten years: *Provided,* That such period may be adjusted at the discretion of the Secretary to provide additional time due to time delays caused by an act of an agent of the United States or by other circumstances

beyond the control of the purchaser. The Secretary shall require the purchaser to file as soon as practicable after execution of a contract for any advertised sale with a term of two years or more, a plan of operation, which shall be subject to concurrence by the Secretary. The Secretary shall not extend any contract period with an original term of two years or more unless he finds (A) that the purchaser has diligently performed in accordance with an approved plan of operation or (B) that the substantial overriding public interest justifies the extension.

(d) Advertisement of sales; exceptions

The Secretary of Agriculture shall advertise all sales unless he determines that extraordinary conditions exist, as defined by regulation, or that the appraised value of the sale is less than $10,000. If, upon proper offering, no satisfactory bid is received for a sale, or the bidder fails to complete the purchase, the sale may be offered and sold without further advertisement.

(e) Bidding methods; purposes; oral auction procedures; monitoring and enforcement for prevention of collusive practices

(1) In the sale of trees, portions of trees, or forest products from National Forest System lands (hereinafter referred to in this subsection as "national forest materials"), the Secretary of Agriculture shall select the bidding method or methods which—

(A) insure open and fair competition;

(B) insure that the Federal Government receive not less than the appraised value as required by subsection (a) of this section;

(C) consider the economic stability of communities whose economies are dependent on such national forest materials, or achieve such other objectives as the Secretary deems necessary; and

(D) are consistent with the objectives of this Act and other Federal statutes.

The Secretary shall select or alter the bidding method or methods as he determines necessary to achieve the objectives stated in clauses (A), (B), (C), and (D) of this paragraph.

(2) In those instances when the Secretary selects oral auction as the bidding method for the sale of any national forest materials, he shall require that all prospective purchasers submit written sealed qualifying bids. Only prospective purchasers whose written sealed qualifying bids are equal to or in excess of the appraised value of such national forest materials may participate in the oral bidding process.

(3) The Secretary shall monitor bidding patterns involved in the sale of national forest materials. If the Secretary has a reasonable belief that collusive bidding practices may be occurring, then—

(A) he shall report any such instances of possible collusive bidding or suspected collusive bidding practices to the Attorney General of the United States with any and all supporting data;

(B) he may alter the bidding methods used within the affected area; and

(C) he shall take such other action as he deems necessary to eliminate such practices within the affected area.

(f) Research and demonstration projects

The Secretary of Agriculture, under such rules and regulations as he may prescribe, is authorized to dispose of, by sale or otherwise, trees, portions of trees, or other forest products related to research and demonstration projects.

(g) Designation, marking, and supervision of harvesting; personnel

Designation, marking when necessary, and supervision of harvesting of trees, portions of trees, or forest products shall be conducted by persons employed by the Secretary of Agriculture. Such persons shall have no personal interest in the purchase or harvest of such products and shall not be directly or indirectly in the employment of the purchaser thereof.

(h) Utilization standards, methods of measurement, and harvesting practices; monetary deposits by purchasers of salvage harvests; nature, purposes and availability of designated fund; return of surplus to Treasury

The Secretary of Agriculture shall develop utilization standards, methods of measurement, and harvesting practices for the removal of trees, portions of trees, or forest products to provide for the optimum practical use of the wood material. Such standards, methods, and practices shall reflect consideration of opportunities to promote more effective wood utilization, regional conditions, and species characteristics and shall be compatible with multiple use resource management objectives in the affected area. To accomplish the purpose of this subsection in situations involving salvage of insect-infested, dead, damaged, or down timber, and to remove associated trees for stand improvement, the Secretary is authorized to require the purchasers of such timber to make monetary deposits, as a part of the payment for the timber, to be deposited in a designated fund from which sums are to be used, to cover the cost to the United States for design, engineering, and supervision of the construction of needed roads and the cost for Forest Service sale preparation and supervision of the harvesting of such timber. Deposits of money pursuant to this subsection are to be available until expended to cover the cost to the United States of accomplishing the purposes for which deposited: *Pro-*

vided, That such deposits shall not be considered as moneys received from the national forests within the meaning of sections 500 and 501 of this title: *And provided further,* That sums found to be in excess of the cost of accomplishing the purposes for which deposited on any national forest shall be transferred to miscellaneous receipts in the Treasury of the United States.

(i) Purchaser credit for permanent road construction; right of election of small business concerns; estimated cost; date of completion; use of funds for construction; effective date

(1) For sales of timber which include a provision for purchaser credit for construction of permanent roads with an estimated cost in excess of $20,000, the Secretary of Agriculture shall promulgate regulations requiring that the notice of sale afford timber purchasers qualifying as "small business concerns" under the Small Business Act, as amended [15 U.S.C. 631 et seq.], and the regulations issued thereunder, an estimate of the cost and the right, when submitting a bid, to elect that the Secretary build the proposed road: *Provided,* That the provisions of this subsection shall not apply to sales of timber on National Forest System lands in the State of Alaska.

(2) If the purchaser makes such an election, the price subsequently paid for the timber shall include all of the estimated cost of the road. In the notice of sale, the Secretary of Agriculture shall set a date when such road shall be completed which shall be applicable to either construction by the purchaser or the Secretary, depending on the election. To accomplish requested work, the Secretary is authorized to use from any receipts from the sale of timber a sum equal to the estimate for timber purchaser credits, and such additional sums as may be appropriated for the construction of roads, such funds to be available until expended, to construct a road that meets the standards specified in the notice of sale.

(3) The provisions of this subsection shall become effective on October 1, 1976.

* * * *

§ 1604. National Forest System land and resource management plans

(a) Development, maintenance, and revision by Secretary of Agriculture as part of program; coordination

As as part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

(b) Criteria

In the development and maintenance of land management plans for use on units of the National Forest System, the Secretary shall use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.

(c) Incorporation of standards and guidelines by Secretary; time of completion; progress reports; existing management plans

The Secretary shall begin to incorporate the standards and guidelines required by this section in plans for units of the National Forest System as soon as practicable after October 22, 1976, and shall attempt to complete such incorporation for all such units by no later than September 30, 1985. The Secretary shall report to the Congress on the progress of such incorporation in the annual report required by section 1606(c) of this title. Until such time as a unit of the National Forest System is managed under plans developed in accordance with this subchapter,

the management of such unit may continue under existing land and resource management plans.

(d) Public participation in management plans; availability of plans; public meetings

The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.

(e) Required assurances

In developing, maintaining, and devising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans—

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528-531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1) of this section, the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management.

(f) Required provisions

Plans developed in accordance with this section shall—

(1) form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents, available to the public at convenient locations, all of the features required by this section;

(2) be embodied in appropriate written material, including maps and other descriptive documents, reflecting proposed and possible actions, including the planned timber sale program and the proportion of probable methods of timber harvest within the unit necessary to fulfill the plan;

(3) be prepared by an interdisciplinary team. Each team shall prepare its plan based on inventories of the applicable resource of the forest;

(4) be amended in any manner whatsoever after final adoption after public notice, and, if such amendment would result in a significant change in such plan, in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section; and

(5) be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years, and (B) in accordance with the provisions of subsection (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section.

(g) Promulgation of regulations for development and revision of plans; environmental considerations; resource management guidelines; guidelines for land management plans

As soon as practicable, but not later than two years after October 22, 1976, the Secretary shall in accordance with the procedures set forth in section 553 of title 5,

promulgate regulations, under the principles of the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528-531] that set out the process for the development and revision of the land management plans, and the guidelines and standards prescribed by this subsection. The regulations shall include, but not be limited to—

(1) specifying procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.], including, but not limited to, direction on when and for what plans an environmental impact statement required under section 102(2)(C) of that Act [42 U.S.C. 4332(2)(C)] shall be prepared;

(2) specifying guidelines which—

(A) require the identification of the suitability of lands for resource management;

(B) provide for obtaining inventory data on the various renewable resources, and soil and water, including pertinent maps, graphic material, and explanatory aids; and

(C) provide for methods to identify special conditions or situations involving hazards to the various resources and their relationship to alternative activities;

(3) specifying guidelines for land management plans developed to achieve the goals of the Program which—

(A) insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recre-

ation (including wilderness), range, timber, watershed, wildlife, and fish;

(B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-used objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan;

(C) insure research on and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the land;

(D) permit increases in harvest levels based on intensified management practices, such as reforestation, thinning, and tree improvement if (i) such practices justify increasing the harvests in accordance with the Multiple-Use Sustained-Yield Act of 1960, and (ii) such harvest levels are decreased at the end of each planning period if such practices cannot be successfully implemented or funds are not received to permit such practices to continue substantially as planned;

(E) insure that timber will be harvested from National Forest System lands only where—

(i) soil, slope, or other watershed conditions will not be irreversibly damaged;

(ii) there is assurance that such lands can be adequately restocked within five years after harvest;

(iii) protection is provided for streams, streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes in water temperatures, blockages of water courses, and deposits of sediment, where harvests are likely to seriously and adversely affect water conditions or fish habitat; and

(iv) the harvesting system to be used is not selected primarily because it will give the greatest dollar return or the greatest unit output of timber; and

(F) insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an evenaged stand of timber will be used as a cutting method on National Forest System lands only where—

(i) for clearcutting, it is determined to be the optimum method, and for other such cuts it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan;

(ii) the interdisciplinary review as determined by the Secretary has been completed and the potential environmental, biological, esthetic, engineering, and economic impacts on each advertised sale area have been assessed, as well as the consistency of the sale with the multiple use of the general area;

(iii) cut blocks, patches, or strips are shaped and blended to the extent practicable with the natural terrain;

(iv) there are established according to geographic areas, forest types, or other suitable classifications the maximum size limits for areas to be cut in one harvest operation, including provision to exceed the established limits after appropriate public notice and review by the responsible Forest Service officer one level above the Forest Service officer who normally would approve the harvest proposal: *Provided*, That such limits shall not apply to the size of areas harvested as a result of natural catastrophic conditions such as fire, insect and disease attack, or windstorm; and

(v) such cuts are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource.

(h) Scientific committee to aid in promulgation of regulations; termination; revision committees; clerical and technical assistance; compensation of committee members

(1) In carrying out the purposes of subsection (g) of this section, the Secretary of Agriculture shall appoint a committee of scientists who are not officers or employees of the Forest Service. The committee shall provide scientific and technical advice and counsel on proposed guidelines and procedures to assure that an effective interdisciplinary approach is proposed and adopted. The committee shall terminate upon promulgation of the regulations, but the Secretary may, from time to time, appoint similar committees when considering revisions of the regulations. The views of the committees shall be included in the public information supplied when the regulations are proposed for adoption.

(2) Clerical and technical assistance, as may be necessary to discharge the duties of the committee, shall be provided from the personnel of the Department of Agriculture.

(3) While attending meetings of the committee, the members shall be entitled to receive compensation at a rate of $100 per diem, including traveltime, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, for persons in the Government service employed intermittently.

(i) Consistency of resource plans, permits, contracts, and other instruments with land management plans; revision

Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Those resource plans and permits, contracts, and other such instruments currently in existence shall be revised as soon as practicable to be made consistent with such plans. When land management plans are revised, resource plans and permits, contracts, and other instruments, when necessary, shall be revised as soon as practicable. Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights.

(j) Effective date of land management plans and revisions

Land management plans and revisions shall become effective thirty days after completion of public participation and publication of notification by the Secretary as required under subsection (d) of this section.

(k) Development of land management plans

In developing land management plans pursuant to this subchapter, the Secretary shall identify lands within the

management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible, as determined by the Secretary, and shall assure that, except for salvage sales or sales necessitated to protect other multiple-use values, no timber harvesting shall occur on such lands for a period of 10 years. Lands once identified as unsuitable for timber production shall continue to be treated for reforestation purposes, particularly with regard to the protection of other multiple-use values. The Secretary shall review his decision to classify these lands as not suited for timber production at least every 10 years and shall return these lands to timber production whenever he determines that conditions have changed so that they have become suitable for timber production.

(l) Program evaluation; process for estimating long-term costs and benefits; summary of data included in annual report

The Secretary shall—

(1) formulate and implement, as soon as practicable, a process for estimating long-terms [1] costs and benefits to support the program evaluation requirements of this subchapter. This process shall include requirements to provide information on a representative sample basis of estimated expenditures associated with the reforestation, timber stand improvement, and sale of timber from the National Forest System, and shall provide a comparison of these expenditures to the return to the Government resulting from the sale of timber; and

(2) include a summary of data and findings resulting from these estimates as a part of the annual report required pursuant to section 1606(c) of this title, including an identification on a representative

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[1] So in original. Probably should be "long-term".

sample basis of those advertised timber sales made below the estimated expenditures for such timber as determined by the above cost process; and

(m) Establishment of standards to ensure culmination of mean annual increment of growth; silvicultural practices; salvage harvesting; exceptions

The Secretary shall establish—

(1) standards to insure that, prior to harvest, stands of trees throughout the National Forest System shall generally have reached the culmination of mean annual increment of growth (calculated on the basis of cubic measurement or other methods of calculation at the discretion of the Secretary): *Provided,* That these standards shall not preclude the use of sound silvicultural practices, such as thinning or other stand improvement measures: *Provided further,* That these standards shall not preclude the Secretary from salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow or other catastrophe, or which are in imminent danger from insect or disease attack; and

(2) exceptions to these standards for the harvest of particular species of trees in management units after consideration has been given to the multiple uses of the forest including, but not limited to, recreation, wildlife habitat, and range and after completion of public participation processes utilizing the procedures of subsection (d) of this section.

* * * *

§ 1611. Timber

(a) Limitations on removal; variations in allowable sale quantity; public participation

The Secretary of Agriculture shall limit the sale of timber from each national forest to a quantity equal to

or less than a quantity which can be removed from such forest annually in perpetuity on a sustained-yield basis: *Provided,* That, in order to meet overall multiple-use objectives, the Secretary may establish an allowable sale quantity for any decade which departs from the projected long-term average sale quantity that would otherwise be established: *Provided further,* That any such planned departure must be consistent with the multiple-use management objectives of the land management plan. Plans for variations in the allowable sale quantity must be made with public participation as required by section 1604(d) of this title. In addition, within any decade, the Secretary may sell a quantity in excess of the annual allowable sale quantity established pursuant to this section in the case of any national forest so long as the average sale quantities of timber from such national forest over the decade covered by the plan do not exceed such quantity limitation. In those cases where a forest has less than two hundred thousand acres of commercial forest land, the Secretary may use two or more forests for purposes of determining the sustained yield.

(b) Salvage harvesting

Nothing in subsection (a) of this section shall prohibit the Secretary from salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow, or other catastrophe, or which are in imminent danger from insect or disease attack. The Secretary may either substitute such timber for timber that would otherwise be sold under the plan or if not feasible, sell such timber over and above the plan volume.

* * * *

28 U.S.C. § 1346

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act for 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the

District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and After January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counter-claim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

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The Contract Disputes Act of 1978 as amended, Sections 2, 3, 6, 8, 10, and 13, 41 U.S.C. §§ 601, 602, 605, 607, 609, 612

§ 601. Definitions

As used in this chapter—

(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;

(2) the term "executive agency" means an executive department as defined in section 101 of title 5, an independent establishment as defined by section 104 of title 5 (except that it shall not include the General Accounting Office), a military department as defined by section 102 of title 5, and a wholly owned Government corporation as defined by section 9101(3) of title 31, the United States Postal Service, and the Postal Rate Commission;

(3) The [1] term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term "contractor" means a party to a Government contract other than the Government;

(5) The [1] term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act [41 U.S.C. 401 et seq.];

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[1] So in original. Probably should not be capitalized.

(6) The [1] term "agency board" means an agency board of contract appeals established under section 607 of this title; and

(7) The [2] term "misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

§ 602. Applicability of law

(a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) entered into by an executive agency for—

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or

(4) the disposal of personal property.

(b) Tennessee Valley Authority contracts

With respect to contracts of the Tennessee Valley Authority, the provisions of this chapter shall apply only to those contracts which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this chapter, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the chapter.

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[2] So in original. Probably should not be capitalized.

(c) Foreign government or international organization contracts

This chapter does not apply to a contract with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, if the head of the agency determines that the application of the chapter to the contract would not be in the public interest.

* * * *

§ 605. Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chap-

ter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(c) Amount of claim; certification; notification; time of issuance; presumption

(1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000—

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

* * * *

§ 606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officers' decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

§ 607. Agency boards of contracts appeals

(a) Establishment; consultation; Tennessee Valley authority

(1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.

(b) Appointment of members; chairman; compensation

(1) Except as provided in paragraph (2), the members of agency boards shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of title 5, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of agency boards serving as such on the effective date of this chapter shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. The chairman of each agency board shall receive compensation at a rate equal to that paid a GS-18 under the General Schedule contained in section 5332, of title 5, the vice chairman shall receive compensation at a rate equal to that paid a GS-17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS-16 under such General Schedule. Such positions shall be in addition to the number of positions which may be placed in GS-16, GS-17, and GS-18 of such General Schedule under existing law.

(2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of contract appeals established in subsection (a)(2) of this section, and shall designate a chairman of such board. The chairman of such board shall receive compensation at a rate equal to the daily rate paid a GS-18 under the General Schedule contained in section 5332, of title 5, for each day he is engaged in the actual performance of his duties as a member of such board. All other members of such board shall receive compensation at a rate equal to the daily rate paid a GS-16 under such General Schedule for each day they are engaged in the actual performance of their duties as members of such board.

(c) Appeals; inter-agency arrangements

If the volume of contract claims is not sufficient to justify an agency board under subsection (a) of this section or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers of his agency to be decided by a board of contract appeals of another executive agency. In the event an agency head is unable to make such an arrangement with another agency, he shall submit the case to the Administrator for placement with an agency board. The provisions of this subsection shall not apply to the Tennessee Valley Authority.

(d) Jurisdiction

Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court.

(e) Decisions

An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

(f) Accelerated appeal disposition

The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is $50,000 or less. The accelerated procedure

shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g) Review

(1) The decision of an agency board of contract appeals shall be final, except that—

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that—

(A) a contractor may appeal such a decision to a United States district court pursuant to the provisions of section 1337 of title 28, within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of title 28, within one hundred twenty days after the date of the decision in any case.

(h) Procedural guidelines

Pursuant to the authority conferred under the Office of Federal Procurement Policy Act [41 U.S.C. 401 *et seq.*] the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this chapter, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority).

* * * * *

§ 609. Judicial review of board decisions

(a) Actions in United States Claims Court; district court actions; time for filing

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) Finality of board decision

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract pro-

vision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) Remand or retention of case

In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 607 of this title, the court may render an opinion and judgement and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) Consolidation

If two or more suits arising from one contract are filed in the United States Claims Court and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Claims Court may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

(e) Judgments as to fewer than all claims

In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

* * * *

§ 612. Payment of claims

(a) Judgments

Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of title 31.

(b) Monetary awards

Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.

(c) Reimbursement

Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

(d) Tennessee Valley Authority

(1) Notwithstanding the provisions of subsection (a) through (c) of this section, any judgment against the Tennessee Valley Authority on a claim under this chapter shall be paid promptly in accordance with the provisions of section 831h(b) of title 16.

(2) Notwithstanding the provisions of subsection (a) through (c), any monetary award to a contractor by the board of contract appeals for the Tennessee Valley Authority shall be paid in accordance with the provisions of section 831h(b) of title 16.

* * * *

The National Environmental Policy Act, Section 102, 42 U.S.C. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

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[1] So in original. The period probably should be a semicolon.

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

* * * *

36 C.F.R. §§ 219.3 (excerpts), 219.10, 219.12, 219.16

§ 219.3 Definitions and terminology.

For purposes of this subpart the following terms, respectively, shall mean:

Allowable sale quantity: The quantity of timber that may be sold from the area of suitable land covered by the forest plan for a time period specified by the plan. This quantity is usually expressed on an annual basis as the "average annual allowable sale quantity."

Base sale schedule: A timber sale schedule formulated on the basis that the quantity of timber planned for sale and harvest for any future decade is equal to or greater than the planned sale and harvest for the preceding decade, and this planned sale and harvest for any decade is not greater than the long-term sustained yield capacity.

* * * *

Long-term sustained-yield timber capacity: The highest uniform wood yield from lands being managed for timber production that may be sustained under a specified management intensity consistent with multiple-use objectives.

* * * *

Sale schedule: The quantity of timber planned for sale by time period from an area of suitable land covered by a forest plan. The first period, usually a decade, of the selected sale schedule provides the allowable sale quantity. Future periods are shown to establish that long-term sustained yield will be achieved and maintained.

* * * *

§ 219.10 Forest planning—general procedure.

(a) *Responsibilities*—(1) *Regional Forester.* The Regional Forester shall establish regional policy for forest planning and approve all forest plans in the region.

(2) *Forest Supervisor.* The Forest Supervisor has overall responsibility for the preparation and implementation of the forest plan and preparation of the environmental impact statement for the forest plan. The Forest Supervisor appoints and supervises the interdisciplinary team.

(3) *Interdisciplinary team.* The team, under the direction of the Forest Supervisor, implements the public participation and coordination activities required by § 219.6 and § 219.7. The team shall continue to function even though membership may change and shall monitor and evaluate planning results and recommend revisions and amendments. The interdisciplinary team shall develop a forest plan and environmental impact statement using the process established in § 219.12 and paragraph (b) below.

(b) *Public review of plan and environmental impact statement.* A draft and final environmental impact statement shall be prepared for the proposed plan according to NEPA procedures. The draft environmental impact statement shall identify a preferred alternative. To comply with 16 U.S.C. 1604(d), the draft environmental impact statement and proposed plan shall be available for public comment for at least 3 months, at convenient locations in the vicinity of the lands covered by the plan, beginning on the date of the publication of the notice of availability in the FEDERAL REGISTER. During this period, and in accordance with the provisions in § 219.6, the Forest Supervisor shall publicize and hold public participation activities as deemed necessary to obtain adequate public input.

(c) *Plan approval.* The Regional Forester shall review the proposed plan and the final environmental impact statement and either approve or disapprove the plan.

(1) *Approval.* The Regional Forester shall prepare a concise public record of decision which documents approval and accompanies the plan and final environmental

impact statement. The record of decision shall be prepared according to NEPA procedures (40 CFR 1505.2). The approved plan shall not become effective until at least 30 days after publication of the notice of availability of the final environmental impact statement in the FEDERAL REGISTER, to comply with 16 U.S.C. 1604(d) and 1604(j).

(2) *Disapproval.* The Regional Forester shall return the plan and final environmental impact statement to the Forest Supervisor with a written statement of the reasons for disapproval. The Regional Forester may also specify a course of action to be undertaken by the Forest Supervisor in order to remedy deficiencies, errors, or ommissions in the plan or environmental impact statement.

(d) *Public appeal of approval decision.* The provisions of 36 CFR part 211, subpart B apply to any administrative appeal of the Regional Forester's decision to approve a forest plan. Decisions to disapprove a plan and other decisions made during the forest planning process prior to the issuance of a record of decision approving the plan are not subject to administrative appeal.

(e) *Plan implementation.* As soon as practicable after approval of the plan, the Forest Supervisor shall ensure that, subject to valid existing rights, all outstanding and future permits, contracts, cooperative agreements, and other instruments for occupancy and use of affected lands are consistent with the plan. Subsequent administrative activities affecting such lands, including budget proposals, shall be based on the plan. The Forest Supervisor may change proposed implementation schedules to reflect differences betwen proposed annual budgets and appropriated funds. Such scheduled changes shall be considered an amendment to the forest plan, but shall not be considered a significant amendment, or require the preparation of an environmental impact statement, unless the changes significantly alter the long-term relationship between levels of multiple-use goods and services projected

under planned budget proposals as compared to those projected under actual appropriations.

(f) *Amendment.* The Forest Supervisor may amend the forest plan. Based on an analysis of the objectives, guidelines, and other contents of the forest plan, the Forest Supersor shall determine whether a proposed amendment would result in a significant change in the plan. If the change resulting from the proposed amendment is determined to be significant, the Forest Supervisor shall follow the same procedure as that required for development and approval of a forest plan. If the change resulting from the amendment is determined not to be significant for the purposes of the planning process, the Forest Supervisor may implement the amendment following appropriate public notification and satisfactory completion of NEPA procedures.

(g) *Revision.* A forest plan shall ordinarily be revised on a 10-year cycle or at least every 15 years. It also may be revised whenever the Forest Supervisor determines that conditions or demands in the area covered by the plan have changed significantly or when changes in RPA policies, goals, or objectives would have a significant effect on forest level programs. In the monitoring and evaluation process, the interdisciplinary team may recommend a revision of the forest plan at any time. Revisions are not effective until considered and approved in accordance with the requirements for the development and approval of a forest plan. The Forest Supervisor shall review the conditions on the land covered by the plan at least every 5 years to determine whether conditions or demands of the public have changed significantly.

(h) *Planning records.* The Forest Supervisor and interdisciplinary team shall develop and maintain planning records that document the decisions and activities that result from the process of developing a forest plan. Records that support analytical conclusions made and alter-

natives considered by the team and approved by the Forest Supervisor throughout the planning process shall be maintained. Such supporting records provide the basis for the development of the forest plan and associated documents required by NEPA procedures.

* * * *

§ 219.12 Forest planning—process.

(a) *General requirements.* The preparation, revision, or significant amendment of a forest plan shall comply with the requirements established in this section. The planning process includes at least those actions set forth in paragraphs (b) through (k) of the section. Some actions may occur simultaneously, and it may be necessary to repeat an action as additional information becomes available. The environmental impact statement for each forest plan shall be prepared according to NEPA procedures. To the extent feasible, a single process shall be used to meet planning and NEPA requirements.

(b) *Identification of purpose and need.* The interdisciplinary team shall identify and evaluate public issues, management concerns, and resource use and development opportunities, including those identified throughout the planning process during public participation activities and coordination with other Federal agencies, State and local governments, and Indian tribes. The Forest Supervisor shall determine the major public issues, management concerns, and resource use and development opportunities to be addressed in the planning process.

(c) *Planning criteria.* Criteria shall be prepared to guide the planning process. Criteria apply to collection and use of inventory data and information, analysis of the management situation, and the design, formulation, and evaluation of alternatives. Criteria designed to achieve the objective of maximizing net public benefits shall be included. Specific criteria may be derived from—

(1) Laws, Executive Orders, regulations, and agency policy as set forth in the Forest Service Manual;

(2) Goals and objectives in the RPA Program and regional guides;

(3) Recommendations and assumptions developed from public issues, management concerns, and resource use and development opportunities;

(4) The plans and programs of other Federal agencies, State and local governments, and Indian tribes;

(5) Ecological, technical, and economic factors; and

(6) The resource integration and management requirements in §§ 219.13 through 219.27.

(d) *Inventory data and information collection.* Each Forest Supervisor shall obtain and keep current inventory data appropriate for planning and managing the resources under his or her administrative jurisdiction. The Supervisor will assure that the interdisciplinary team has access to the best available data. This may require that special inventories or studies be prepared. The interdisciplinary team shall collect, assemble, and use data, maps, graphic material, and explanatory aids, of a kind, character, and quality, and to the detail appropriate for the management decisions to be made. Data and information needs may vary as planning problems develop from identification of public issues, management concerns, and resource use and development opportunities. Data shall be stored for ready retrieval and comparison and periodically shall be evaluated for accuracy and effectiveness. The interdisciplinary team will use common data definitions and standards established by the Chief of the Forest Service to assure uniformity of information between all planning levels. As information is recorded, it shall be applied in any subsequent planning process. Information developed according to common data definitions and standards shall be

used in the preparation of the 1990, and subsequent RPA Assessments and RPA Programs.

(e) *Analysis of the management situation.* The analysis of the management situation is a determination of the ability of the planning area covered by the forest plan to supply goods and services in response to society's demands. The primary purpose of this analysis is to provide a basis for formulating a broad range of reasonable alternatives. The analysis may examine the capability of the unit to supply outputs both with and without legal and other requirements. As a minimum, the analysis of the management situation shall include the following:

(1) Benchmark analyses to define the range within which alternatives can be constructed. Budgets shall not be a constraint. The following benchmark analyses shall be consistent with the minimum applicable management requirements of § 219.27 and shall define at least—

(i) The minimum level of management which would be needed to maintain and protect the unit as part of the National Forest System together with associated costs and benefits;

(ii) The maximum physical and biological production potentials of significant individual goods and services together with associated costs and benefits;

(iii) Monetary benchmarks which estimate the maximum present net value of those resources having an established market value or an assigned value;

(A) For forest planning areas with major resource outputs that have an established market price, monetary benchmarks shall include an estimate of the mix of resource uses, combined with a schedule of outputs and costs, which will maximize the present net value of those major outputs that have an established market price;

(B) For all forest planning areas, monetary benchmarks shall include an estimate of the mix of resource

uses, combined with a schedule of outputs and costs, which will maximize the present net value of those major outputs that have an established market price or are assigned a monetary value;

(C) For forest planning areas with a significant timber resource, estimates for paragraphs (e)(1)(iii)(A) and (B) of this section shall be developed both with and without meeting the requirements for compliance with a base sale schedule of timber harvest, as described in § 219.16(a)(1), and with and without scheduling the harvest of even-aged stands generally at or beyond culmination of mean annual increment of growth, as described in § 219.16(a)(2)(iii).

(D) Estimates for paragraphs (e)(1)(iii)(A) and (B) of this section shall be developed both with and without other constraints when needed to address major public issues, management concerns, or resource opportunities identified during the planning process.

(2) The current level of goods and services provided by the unit and the most likely amount of goods and services expected to be provided in the future if current management direction continues; this will be the same analysis as that required by § 219.12(f)(5).

(3) Projections of demand using best available techniques, with both price and nonprice information. To the extent practical, demand will be assessed as price-quantity relationships.

(4) A determination of the potential to resolve public issues and management concerns.

(5) Based on consideraiton of data and findings developed in paragraphs (e)(1)-(4), a determination of the need to establish or change management direction.

(f) *Formulation of alternatives.* The interdisciplinary team shall formulate a broad range of reasonable alternatives according to NEPA procedures. The primary

goal in formulating alternatives, besides complying with NEPA procedures, is to provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits, consistent with the resource integration and management requirements of §§ 219.13 through 219.27.

(1) Alternatives shall be distributed between the minimum resource potential and the maximum resource potential to reflect to the extent practicable the full range of major commodity and environmental resource uses and values that could be produced from the forest. Alternatives shall reflect a range of resource outputs and expenditure levels.

(2) Alternatives shall be formulated to facilitate analysis of opportunity costs and of resource use and environmental trade-offs among alternatives and between benchmarks and alternatives.

(3) Alternatives shall be formulated to facilitate evaluation of the effects on present net value, benefits, and costs of achieving various outputs and values that are not assigned monetary values, but that are provided at specified levels.

(4) Alternatives shall provide different ways to address and respond to the major public issues, management concerns, and resource opportunities identified during the planning process.

(5) Reasonable alternatives which may require a change in existing law or policy to implement shall be formulated if necessary to address a major public issue, management concern, or resource opportunity identified during the planning process (40 CFR 1501.7, 1502.14 (c)).

(6) At least one alternative shall be developed which responds to and incorporates the RPA Program tentative resource objectives for each forest displayed in the regional guide.

(7) At least one alternative shall reflect the current level of goods and services provided by the unit and the most likely amount of goods and services expected to be provided in the future if current management direction continues. Pursuant to NEPA procedures, this alternative shall be deemed the "no action" alternative.

(8) Each alternative shall represent to the extent practicable the most cost efficient combination of management prescriptions examined that can meet the objectives established in the alternative.

(9) Each alternative shall state at least—

(i) The condition and uses that will result from long-term application of the alternative;

(ii) The goods and services to be produced, the timing and flow of these resource outputs together with associated costs and benefits;

(iii) Resource management standards and guidelines; and

(iv) The purposes of the management direction proposed.

(g) *Estimated effects of alternatives.* The physical, biological, economic, and social effects of implementing each alternative considered in detail shall be estimated and compared according to NEPA procedures. These effects include those described in NEPA procedures (40 CFR 1502.14 and 1502.16) and at least the following:

(1) The expected outputs for the planning periods, including appropriate marketable goods and services, as well as nonmarket items, such as recreation and wilderness use, wildlife and fish, protection and enhancement of soil, water, and air, and preservation of aesthetic and cultural resource values;

(2) The relationship of expected outputs to the RPA Program tentative resource objectives for the forest displayed in the current regional guide;

(3) Direct and indirect benefits and costs, analyzed in sufficient detail to estimate—

(i) the expected real-dollar costs (discounted when appropriate), including investment, administrative, and operating costs of the agency and all other public and private costs required to manage the forest up to the point where the outputs are valued and the environmental consequences are realized;

(ii) the expected real-dollar value (discounted when appropriate) of all outputs attributable to each alternative to the extent that monetary values can be assigned to nonmarket goods and services, using quantitative and qualitative criteria when monetary values may not reasonably be assigned;

(iii) the economic effects of alternatives, including impacts on present net value, total receipts to the Federal Government, direct benefits to users that are not measured in receipts to the Federal Government, receipt shares to State and local governments, income, and employment in affected areas; and

(iv) the monetary opportunity costs (changes in present net value) associated with those management standards and resource outputs in each alternative that were not assigned monetary values but were provided at specified levels, compared with the maximum present net value benchmarks developed in § 219.12(e)(1)(iii).

(4) The significant resource tradeoffs and opportunity costs associated with achieving alternative resource objectives.

(h) *Evaluation of alternatives:* Using planning criteria, the interdisciplinary team shall evaluate the significant physical, biological, economic, and social effects of each management alternative that is considered in detail. The evaluation shall include a comparative analysis of the aggregate effects of the management alternatives and shall compare present net value, social and economic im-

pacts, outputs of goods and services, and overall protection and enhancement of environmental resources.

(i) *Preferred alternative recommendation.* The Forest Supervisor shall review the interdisciplinary team's evaluation and shall recommend to the Regional Forester a preferred alternative to be identified in the draft environmental impact statement and displayed as the proposed plan.

(j) *Plan approval.* The Regional Forester shall review the proposed plan and final environmental impact statement and either approve or disapprove the plan in accordance with § 219.10(c). The record of decision for approval of a plan shall include, in addition to the requirements of NEPA procedures (40 CFR 1505.2), a summarized comparison of the selected alternative with:

(1) Any other alternative considered which is environmentally preferable to the selected alternative; and

(2) Any other alternative considered which comes nearer to maximizing present net value.

(k) *Monitoring and evaluation.* At intervals established in the plan, implementation shall be evaluated on a sample basis to determine how well objectives have been met and how closely management standards and guidelines have been applied. Based upon this evaluation, the interdisciplinary team shall recommend to the Forest Supervisor such changes in management direction, revisions, or amendments to the forest plan as are deemed necessary. Monitoring requirements identified in the forest plan shall provide for—

(1) A quantitative estimate of performance comparing outputs and services with those projected by the forest plan;

(2) Documentation of the measured prescriptions and effects, including significant changes in productivity of the land; and

(3) Documentation of costs associated with carrying out the planned management prescriptions as compared with costs estimated in the forest plan.

(4) A description of the following monitoring activities:

(i) The actions, effects, or resources to be measured, and the frequency of measurements;

(ii) Expected precision and reliability of the monitoring process; and

(iii) The time when evaluation will be reported.

(5) A determination of compliance with the following standards:

(i) Lands are adequately restocked as specified in the forest plan;

(ii) Lands identified as not suited for timber production are examined at least every 10 years to determine if they have become suited; and that, if determined suited, such lands are returned to timber production;

(iii) Maximum size limits for harvest areas are evaluated to determine whether such size limits should be continued; and

(iv) Destructive insects and disease organisms do not increase to potentially damaging levels following management activities.

* * * *

§ 219.16 Timber resource sale schedule.

In a forest plan, the selected forest management alternative includes a sale schedule which provides the allowable sale quantity. The sale schedule of each alternative, including those which depart from base sale schedules, shall be formulated in compliance with § 219.12(f) and paragraphs (a) and (b) of this section.

(a) Alternatives shall be formulated that include determinations of the quantity of the timber that may be sold during each decade. These quantity determinations shall be based on the principle of sustained yield and shall meet the management requirements in § 219.27. For each alternative, the determination shall include a calculation of the long-term sustained-yield capacity and the base sale schedule and, when appropriate, a calculation of timber sale alternatives that may depart from the base sale schedule as provided in paragraphs (a)(1) through (a)(3) of this section.

(1) For the base sale schedules, the planned sale for any future decade shall be equal to, or greater than, the planned sale for the preceding decade, provided that the planned sale is not greater than the long-term sustained-yield capacity consistent with the management objectives of the alternative.

(2) The determinations of the appropriate long-term sustained-yield capacities, base sale schedules, and departure alternatives to the base sale schedules shall be made on the basis of the guidelines which follow:

(i) For the long-term sustained-yield capacities and the base sale schedules, assume intensities of management and degree of timber utilization consistent with the goals, assumptions, and requirements contained in, or used in, the preparation of the current RPA Program and regional guide. For the base sale schedule, the management and utilization assumptions shall reflect the projected changes in practices for the four decades contained in, or used in,

the preparation of the current RPA Program and regional guide. Beyond the fourth decade, the assumptions shall reflect those projected for the fourth decade of the current RPA Program, unless there is a basis for a different assumption;

(ii) For alternatives with sale schedules which depart from the corresponding base sale schedule, assume an appropriate management intensity;

(iii) In accordance with the established standards, assure that all even-aged stands scheduled to be harvested during the planning period will generally have reached the culmination of mean annual increment of growth. Mean annual increment shall be based on expected growth, according to management intensities and utilization standards assumed in paragraphs (a)(2)(i) and (ii) of this section and on forest type and site quality. Mean annual increment shall be expressed in cubic measure. Alternatives which incorporate exceptions to these standards shall be evaluated if it is reasonable to expect that overall multiple use objectives would be better attained. Alternatives which incorporate exceptions to these standards are permitted for the use of sound silvicultural practices, such as thinning or other stand improvement measures; for salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow, or other catastrophe, or which are in imminent danger from insect or disease attack; for cutting for experimental and research purposes; or for removing particular species of trees, after consideration has been given to the multiple uses of the area being planned and after completion of the public participation process applicable to the preparation of a forest plan; and

(iv) Each sale schedule shall provide for a forest structure that will enable perpetual timber harvest which meets the principle of sustained-yield and multiple-use objectives of the alternative.

(3) Alternatives with sale schedules which depart from the principles of paragraph (a)(1) of this section and which will lead to better attaining the overall objectives of multiple-use management shall be evaluated when any of the following conditions are indicated:

(i) None of the other alternatives considered provides a sale schedule that achieves the assigned goals of the RPA Program as provided in § 219.4(b);

(ii) High mortality losses from any cause can be significantly reduced or prevented or forest age-class distribution can be improved, thereby facilitating future sustained-yield management; or

(iii) Implementation of the corresponding base sale schedule would cause a substantial adverse impact upon a community in the economic area in which the forest is located.

(iv) It is reasonable to expect that overall multiple-use objectives would otherwise be better attained.

(b) The sale schedule of the management alternative selected in accordance with § 219.12 provides the allowable sale quantity for the first plan period.

* * * *

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No. 93-418

In the Supreme Court of the United States

OCTOBER TERM, 1993

SOUTHERN TIMBER PURCHASERS COUNCIL, ET AL.,
PETITIONERS

v.

MARVIN C. MEIER, ACTING REGIONAL FORESTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' claims for declaratory and injunctive relief against a temporary policy that restricted timber harvesting methods in habitat areas of a particular endangered species are moot because the challenged policy is no longer in effect.

2. Whether the court of appeals erred in determining that petitioners lacked standing to sue for alleged violations of the National Environmental Policy Act, the Endangered Species Act, and the National Forest Management Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 993 F.2d 800. The district court's July 29, 1991, order (Pet. App. 22a-40a) is reported at 779 F. Supp. 1353. The district court's August 8, 1990, orders (Pet. App. 41a-50a, 51a-59a) are unreported. The district court's April 23, 1990, order (Pet. App. 60a-74a) is reported at 736 F. Supp. 267.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1993. The petition for a writ of certiorari was filed on September 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, requires the Secretary of the Interior to identify species that are "endangered," *i.e.*, in danger of extinction throughout a significant portion of their range. See 16 U.S.C. 1532(6), 1532(20), 1533. Section 7(a)(2) of the Act requires each federal agency to ensure that agency actions are "not likely to jeopardize the continued existence of any endangered species." 16 U.S.C. 1536(a)(2). Thus, federal agencies are prohibited from authorizing, funding, or carrying out any "action" that is "likely to jeopardize the continued existence of" any endangered species. To ensure that those prohibitions are respected, Congress established a procedural "consultation" requirement. Under that procedure, the responsible agency consults with the U.S. Fish and Wildlife Service (FWS) of the Department of the Interior to determine whether (and to what degree) there may be adverse effects on a particular species as a result of the contemplated agency action. 16 U.S.C. 1536(a)-(d).

b. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agencies to "include in every recommendation or report on * * * major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on * * * (i) the environmental impact of the proposed action." 42 U.S.C. 4332(2)(C). The Council on Environmental Quality (CEQ) has issued regulations governing an agency's decision to prepare such an Environmental Impact Statement (EIS) for a proposed action. 40 C.F.R. Pts. 1501, 1502.

c. The National Forest Management Act of 1976 (NFMA), 16 U.S.C. 1600 *et seq.*, requires the Forest Service to develop "land and resource management plans" for each unit of the National Forest System. 16 U.S.C. 1604(a). Those forest plans must provide for a sustained yield of resources and for multiple use of National Forest lands, including "coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." 16 U.S.C. 1604(e)(1). The development of each such plan, and of any "significant" amendment to a plan, is subject to a set of specified procedures before adoption, including preparation of a draft and a final EIS for any proposed or "significant[ly]" amended plan. See 16 U.S.C. 1604(g); 36 C.F.R. 219.10(b) and (f).

Each forest plan provides general goals and objectives, and also establishes standards and guidelines to govern actions and activities, such as timber harvests, that take place in the forest. Those standards and guidelines are intended to protect resources such as threatened and endangered species, and are adopted following consultation with the FWS in accordance with Section 7(a) of the ESA.

A forest plan is essentially a programmatic statement of intent that operates prospectively. It establishes basic guidance and sets forth the planning elements that the Forest Service will employ in making future site-specific decisions. See *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508, 1511-1512 (9th Cir. 1992). The plan, however, does not constitute assurance that the plan's output targets will be achieved. Rather, actual output levels will be affected by such variables as economic conditions, funding levels, and site-specific circumstances con-

cerning the particular actions that may be proposed. Furthermore, unless it states otherwise, a plan does not constitute a decision to undertake any particular site-specific action.

2. a. The red-cockaded woodpecker (RCW) ranges in the southeastern United States—from Virginia, along the coastal plain, into Texas. The bird is dependent on several species of southern pines for nesting and foraging, and it lives in groups called clans, whose members inhabit the cavities excavated in a group of trees known as a colony site. The bird needs foraging habitat with certain specific characteristics in close proximity to the colony site. Pet. App. 2a-3a.

Extensive clearing of southern pine forests has reduced available habitat for the RCW and brought it to the brink of extinction. The species accordingly was listed as endangered in 1970. The vast majority of the remaining clans of the bird occupy colony sites that are on federal lands, principally in the various National Forests in the Southern Region (Region 8) of the National Forest System. Pet. App. 3a.

Since 1985, the Southern Region has undertaken to protect the RCW in accordance with the most recent revision of the RCW Chapter of the Forest Service Wildlife Habitat Management Handbook. The RCW chapter was prepared through formal consultation with the FWS under Section 7(a) of the ESA, 16 U.S.C. 1536(a). It is based upon the Red-Cockaded Woodpecker Recovery Plan issued in 1985 by the FWS, and provides measures to protect and conserve the bird. The Forest Service incorporated the RCW chapter into the forest plans for those forests having RCW populations. Pet. App. 3a-4a.

b. The Forest Service and the petitioner timber companies entered into timber sale contracts subject to the 1985 handbook chapter. Those contracts contain an endangered species provision specifying that "[i]f protection measures prove inadequate, * * * [the] Forest Service may * * * unilaterally modify this contract to provide additional protection" for an endangered species. Timber Sale Contract provision CT6.25#, *reproduced in* Defendants' Motion to Dismiss, Exhs. 3-5 (filed Feb. 12, 1990). The contracts also include a disputes clause stipulating that the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, is applicable to "all disputes arising under or relating to th[e] contract" (contract provision CT9.2(b)), as well as a provision permitting either party to seek modifications by agreement for any reason (contract provision BT8.3).

Subsequent to the adoption of forest plans and the award of contracts subject to the 1985 handbook chapter, the Forest Service learned from updated RCW inventories that RCW populations in several National Forests were unstable or declining. Compare Administrative Record, Tab 20 (AR 20) (1986 RCW colony data) with AR 24, at 2 (1988 RCW colony data). That information, coupled with the Forest Service's obligation under Section 7(a)(2) of the ESA to ensure that agency actions are "not likely to jeopardize the continued existence of any endangered species," 16 U.S.C. 1536(a)(2), caused the Regional Forester of Region 8 to develop a new RCW-protection strategy, in coordination with both petitioner Southern Timber Purchasers Council (then known as the Region 8 Forest Service Timber Purchasers Council) and the Sierra Club Legal Defense Fund.

Pet. App. 4a, 97a; see also AR 34, 37, 38, 49, 51, 56, 58, 59, 64, 66.

The Regional Forester's new strategy for protection of the RCW in Region 8 was announced on March 27, 1989. Pet. App. 4a, 98a. The strategy included three phases:

> (1) the immediate adoption of a temporary "policy on cutting on existing timber sale contracts within 3/4 mile of active and inactive RCW colonies," to be "implemented within active populations [of] less than 250 active colonies" (Pet. App. 98a);
>
> (2) the development and issuance of "Interim RCW Guidelines * * * which will supersede the existing RCW Handbook direction for those areas within 3/4 mile of RCW Colonies in populations with less than 250 active colonies," and which "will apply to future sales and currently advertised or proposed sales that have been withdrawn and will remain in effect until the Region 8 Regional Guide is amended" (*id.* at 99a); and
>
> (3) amendment of the Region 8 Regional Guide (*ibid.*).

The strategy's first phase—adoption of the temporary policy at issue in this case—was intended to "supplemen[t]" the handbook by "establish[ing] new protection measures for the endangered red-cockaded woodpecker determined necessary to ensure that any action authorized, funded or carried out by the Forest Service is not likely to jeopardize its continued existence." *Id.* at 98a. That temporary policy was made applicable to already awarded sales, as well as "award

pending" contracts, advertised timber sales, and proposed sales. *Id.* at 99a-105a.

The temporary policy limited the permissible methods for timber harvesting within 3/4 mile of a colony site. It also directed the contracting officer immediately to request affected purchasers "to suspend all logging operations on the affected payment units" in accordance with contract provision CT6.25#, and immediately to begin modifying existing contracts "to align them with the policy." Pet. App. 102a-103a. The policy stated a strong preference for "modify[ing] the contract by mutual agreement under BT8.3 to delete individual payment units," and it directed the contracting officers to "[m]ake maximum possible effort to provide timber for deleted volumes" by mutual contract modification. *Id.* at 103a. The policy, however, also permitted both unilateral contract modification under the provision for protection of endangered species, and cancellation of contracts "if the modification changes the sale conditions significantly and the purchaser is unable to recover the original profit margin." *Id.* at 104a.

Petitioners had a total of nine contracts subject to the policy. In light of issuance of the policy, petitioners agreed to modify each of those contracts by substituting other timber lands for those affected by the policy and/or by reducing the payments due to the Forest Service under the contract. Defendants' Motion to Dismiss, Exhs. 6-14 (filed Feb. 12, 1990).

3. On March 31, 1989, petitioner Southern Timber Purchasers Council (Council) administratively challenged the Regional Forester's March 27, 1989, issuance of the temporary policy, alleging violations of NEPA, NFMA, and the Administrative Procedure

Act (APA). AR 30. On April 14, 1989, the Forest Service Deputy Chief ruled that adoption of the policy was not subject to administrative appeal under the applicable regulation, 36 C.F.R. 217.3(a)(1). Pet. App. 94a-96a. At the same time, however, the Deputy Chief directed the Regional Forester to "conduct an environmental analysis and then prepare the appropriate decision document for the policy," with appropriate reference to compliance with ESA, NEPA, and NFMA in establishing the policy. *Id.* at 95a. The Regional Forester subsequently complied with that directive by issuing a biological evaluation on May 3, 1989 (AR 24), and by issuing NEPA and NFMA decisions that "document the rationale and environmental consideration for" the policy on June 26, 1989. AR 16, at 1.

On July 12, 1989, the Council administratively appealed the Regional Forester's June 26 decision, asserting that the decision and the March 1989 policy violated NEPA, the APA, NFMA and its implementing regulations, and the ESA. AR 13. The Council's request for a stay of the decision (AR 13, at 1, 21) was denied on July 25, 1989. AR 8. On September 1, 1989, the Council also sent a letter to the Secretaries of Agriculture and the Interior purporting to give notice of petitioners' intent to file a citizen suit under 16 U.S.C. 1540(g) for alleged violations of the ESA. AR 3.

On October 25, 1989, the Associate Deputy Chief of the Forest Service affirmed the Regional Forester's June 26 decision. Pet. App. 75a-93a. The decision rejected the Council's claims of NEPA, ESA, and NFMA violations, and it emphasized the reasonableness of preserving the environmental status quo "[i]n

the face of small, unstable, and declining RCW populations." *Id.* at 89a. Because the Secretary of Agriculture elected not to conduct discretionary review of the decision, the Associate Deputy Chief's decision was "the final administrative decision of the Department of Agriculture." 36 C.F.R. 217.16(e).

4. On December 7, 1989, petitioners filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of Georgia. The complaint purported to "challenge two actions by [respondents] regarding the red-cockaded woodpecker" (C.A. R.E. 13, ¶ 1): (1) "the Forest Service Region 8's failure to fully implement" the RCW chapter in the 1985 handbook, which petitioners asserted to have been a violation of the ESA (*id.* at 14, ¶ 2); and (2) the "illegal adoption" of the March 1989 policy, which they asserted to have violated the ESA, NFMA, and NEPA (*id.* at 14-15, ¶ 3).

On April 23, 1990, the district court dismissed petitioners' NEPA claims for lack of standing. Pet. App. 60a-74a. The court concluded that petitioners were not within the "zone of interests" protected by NEPA, because their "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit" to proceed. *Id.* at 66a.

On August 8, 1990, the court dismissed petitioners' ESA claims. Pet. App. 51a-59a. Thereafter, the court granted summary judgment for the government on petitioners' remaining claims. *Id.* at 22a-40a. The court entered judgment on July 30, 1991.

5. On May 25, 1990, during the pendency of the district court litigation, the Forest Service implemented the second phase of its new strategy for protection of the RCW by issuing Interim Standards and Guidelines for the management of RCW habitat. Pet. C.A. Br. addendum, Tab 7, at 2. The interim standards supersede the temporary policy at issue in this case. The issuance of the new standards and guidelines followed an opportunity for public comment and review by the FWS, and it was accompanied by new decision documents, including a decision notice, an environmental analysis (EA), and a biological evaluation. *Id.* at 2, 4.

The district court rejected the government's contention that petitioners' challenge to the temporary policy was rendered moot when that policy was superseded by the Interim Standards and Guidelines. Pet. App. 57a-58a. The Council administratively challenged the Interim Standards and Guidelines, but that challenge was rejected by the Department of Agriculture in a final decision issued October 24, 1991. See Pet. C.A. Br. addendum, Tab 7. Petitioners apparently have not sought judicial review of that decision.

6. The court of appeals affirmed the district court's judgment dismissing petitioners' claims. Pet. App. 1a-21a. Although petitioners asserted that the Forest Service's temporary policy caused them to suffer economic, environmental, procedural, and "quality of life" injuries (*id.* at 8a-9a), the court concluded that petitioners had "failed to establish an injury to themselves sufficient to confer standing." *Id.* at 20a.

The court of appeals first rejected petitioners' reliance on the alleged economic injuries resulting from issuance of the temporary policy. Pet. App. 13a-14a. Petitioners claimed that the policy reduced the quantity of timber available under their timber contracts with the Forest Service and increased their costs under those contracts. The court concluded, however, that because the contracts explicitly provide that "all disputes arising under or relating to" the contracts must be resolved pursuant to the process set forth in the Contract Disputes Act, which vests judicial review exclusively in the Court of Federal Claims (41 U.S.C. 609(a)(1) (Supp. IV 1992)), petitioners could "not predicate their standing to sue * * * upon contractual injuries." Pet. App. 14a.

In addition, the court rejected petitioners' claims of standing based on economic injury relating to future timber contracts, both because "the Council and Timber Companies have no right to compel the Forest Service to sell any future timber to them" and because, even if they had such a right, "there is not a 'substantial likelihood' that this injury will be redressed by the relief they seek." Pet. App. 15a. The court also rejected petitioners' claims of "quality of life" injuries, explaining that those claims were "simply attenuated versions of the economic injuries" asserted by petitioners, and therefore "suffer from the same infirmities." *Id.* at 16a.

The court held that petitioners' claims of environmental injuries were insufficient to support standing because those claims amounted to "nothing more than an interest in developing [RCW] strategies, and a mere interest in a problem, no matter how longstanding the interest, is insufficient to confer standing."

Pet. App. 17a. The court likewise rejected petitioners' attempt to assert the interests of their employees in the outdoors, noting that plaintiffs generally "must assert their own rights and may not rest upon the rights of others" and that the requirements for third-party standing were not satisfied in this case. *Id.* at 18a. Finally, relying on *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130 (1992), the court held that petitioners could not base standing on claims of procedural injury without also showing injury to separate, concrete interests. Pet. App. 19a-20a.

ARGUMENT

1. Petitioners contend that the court of appeals erred in holding that they lacked standing to challenge the Forest Service's temporary policy adopted in March 1989. There is no reason for this Court to consider that contention, however, because petitioners' claims with regard to the temporary policy are moot.

a. A case becomes moot, and thus nonjusticiable, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396 (1980). Moreover, "[i]t is not enough that a controversy existed at the time the complaint was filed." *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988). "The parties must continue to have a '"personal stake in the outcome"'" at all stages of a case. *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990).

Petitioners do not currently possess a "legally cognizable interest" or "personal stake" in the out-

come of this case.[1] The only remedies petitioners sought with respect to their claims of economic injury were a declaration that the temporary policy was invalid, an injunction against its enforcement, and a remand to the Forest Service to reconsider the policy. C.A. R.E. 30, ¶¶ 1, 2, and 5 (Complaint, Request for Relief). The temporary policy is no longer in effect, however, having been superseded by the Interim Standards and Guidelines more than three years ago, on May 25, 1990. Thus, petitioners' alleged economic injuries would not be alleviated even if they were to receive the relief they seek.

Moreover, petitioners voluntarily modified their timber contracts by mutual agreement with the Forest Service in order to facilitate compliance with the temporary policy, and they did so long before filing their complaint in this case. See Defendants' Motion to Dismiss, Exhs. 6-14 (filed Feb. 12, 1990). As part of those contract modifications, petitioners received ample consideration, in the form of additional areas to be logged and/or reductions in their payment obligations to the Forest Service, in exchange for their agreements to modify the contracts. *Ibid.* In accepting the benefits provided by the contract modifications, petitioners have already been compensated for any asserted injuries resulting from issuance of the temporary policy. They thus have no live claim

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[1] The district court rejected the government's assertion of mootness. Pet. App. 57a-58a. The court of appeals did not address the mootness issue in its decision, although we have been informed that the issue was raised at oral argument.

with regard to their preexisting contracts for which they could obtain relief.[2]

In these circumstances, petitioners' claims for injunctive and declaratory relief with regard to the temporary policy are moot. Petitioners are not suffering any present injury that could be remedied by granting them the relief they seek, and thus they have no "'specific live grievance' against the application" of the policy. *Lewis* v. *Continental Bank Corp.*, 494 U.S. at 479. This Court therefore lacks jurisdiction to adjudicate petitioners' claims. *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 70 (1983) (per curiam).

b. The district court recognized that the temporary policy had ceased to be effective due to its replacement by the Interim Standards and Guidelines, but found petitioners' challenges to the policy nonetheless justiciable under the exception to the mootness doctrine that permits adjudication of claims that are "capable of repetition, yet evading review." Pet. App. 57a-58a; see *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). The court justified its conclusion on the grounds that "[petitioners] may reasonably expect that [the government] will significantly alter future forest plans without following

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[2] Morever, as petitioners concede (Pet. 13-14), they are not seeking monetary compensation for any injury allegedly caused by adoption of the temporary policy. Thus, this case would be moot even if petitioners had not agreed to modify their contracts with the Forest Service in exchange for adequate consideration, because there is no meaningful non-monetary relief that can now be granted to petitioners. Cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-110 (1983) (finding no case or controversy with respect to claim for injunctive relief even though plaintiff's claim for money damages was not moot).

Forest Act procedures," and that "[e]ven with the adoption of a new woodpecker plan, [petitioners] have still been denied the procedure to which they assert they are due." Pet. App. 58a. The court concluded that the Forest Service "cannot evade review by continuously adopting short term woodpecker plans." *Ibid.*

Petitioners' claims do not fall within the exception for cases that are capable of repetition, but evading review. That exception applies only where "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. at 149. Petitioners have no reasonable expectation that they will again be subjected to the same allegedly illegal agency conduct that led to promulgation of the temporary policy.

Petitioners' allegations in this case concern claims of procedural and substantive errors under NEPA, the ESA, and NFMA with regard to the adoption of the temporary policy, not the subsequent Interim Standards and Guidelines. The standards and guidelines were issued after preparation of a different environmental assessment and decision notice under NEPA and NFMA and a different ESA biological evaluation with concurrence from the FWS. Pet. C.A. Br. addendum, Tab 7, at 2, 4. While petitioners may claim errors in the adoption of the standards and guidelines, resolution of those entirely distinct claims would depend on review of the administrative record underlying adoption of the standards and guidelines, not the record developed for the temporary policy announced in March 1989.

In effect, the district court was able to conclude that this case is "capable of repetition" only by

equating two entirely different agency actions—adoption of the temporary policy and adoption of the Interim Standards and Guidelines—and by improperly presuming that the Forest Service would repeat the alleged errors that led to issuance of the temporary policy. There is no basis for concluding, however, that the issues in any future challenge by petitioners to the Forest Service's RCW policies would be the same as those raised in this case. Moreover, the Forest Service, like other agencies, "is entitled to a presumption of regularity," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971), and thus it was improper for the district court to assume that petitioners' claims of illegal agency practice would arise in the future. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983) ("the capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality"). Accordingly, the district court erred in concluding that petitioners' challenge to the policy was not moot.

2. Petitioners contend (Pet. 11-18) that the court of appeals erred in concluding that petitioners' allegations of injuries to their economic interests under their timber contracts did not provide standing to sue in federal district court. According to petitioners (Pet. 12), the court of appeals improperly "collapsed two separate questions—the question of standing, and that of the exclusive jurisdiction of the Court of Federal Claims—into one," in conflict with "the approach employed by other circuits." That contention does not merit further review.

None of the cases cited by petitioners as evidence of a circuit conflict (see Pet. 12 n.9, 15-17) holds that plaintiffs in the position of petitioners possess standing to sue in federal district court. Indeed, most of those cases do not discuss standing at all, but focus instead on the analytically distinct question of subject matter jurisdiction under 28 U.S.C. 1346(a)(2). The only case cited by petitioners that does discuss an analogous issue of standing, *National Helium Corp.* v. *Morton*, 455 F.2d 650 (10th Cir. 1971), provides no support for petitioners' claim of a circuit conflict.[3]

National Helium involved a NEPA suit brought by federal contractors against the government. The court expressly declined to hold that the plaintiffs' claims of economic injury arising out of their federal contract were sufficient to establish standing to sue in federal district court. Indeed, the court noted that "federal question jurisdiction would be perhaps somewhat tenuous" if the plaintiffs in that case had relied solely on their own economic interests as a basis for standing. 455 F.2d at 654; see also *id.* at 655 (implying that jurisdiction would have been absent if the plaintiffs had been "motivated solely by protection of their own pecuniary interest"). The court concluded, however, that the plaintiffs' "asserted repre-

[3] In *Wabash Valley Power Ass'n* v. *Rural Electrification Admin.*, 903 F.2d 445 (7th Cir. 1990), the court discussed principles of standing in holding that a power company could contest a proposed rate increase because, *inter alia*, the rate increase would likely lead to imposition of penalties on the company by state regulators. 903 F.2d at 451-452. That ruling is entirely unrelated to the standing issue decided by the court of appeals in this case, and thus the decision in *Wabash Valley* is not inconsistent with the decision below.

sentation of the public interest" in enforcement of NEPA provided a basis for judicial review. *Id.* at 654. Thus, *National Helium* did not decide the question that petitioners seek to raise in this Court, and it therefore does not support petitioners' claim of a circuit conflict on that question.[4]

The decisions cited by petitioners are inapposite for another reason as well. In each of those cases, the question of jurisdiction turned on whether the plaintiffs' claims were "founded upon any express or implied contract with the United States" within the meaning of 28 U.S.C. 1346(a)(2). In this case, by contrast, it is indisputable that "all disputes arising under or *relating to*" petitioners' contracts with the Forest Service are governed by the Contract Disputes Act, 41 U.S.C. 601 *et seq.* See Timber Sale Contract provision CT9.2(b) (emphasis added); see also 41 U.S.C. 605(a) (Contract Disputes Act applies to "[a]ll claims by a contractor against the government *relating to* a contract") (emphasis added). The Contract Disputes Act establishes a detailed scheme for administrative review of disputes involving the government's contractual relationships with private parties, and it vests jurisdiction to review such administrative determinations in the Court of Federal Claims. 41 U.S.C. 609(a)(1) (Supp. IV 1992).

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[4] To be sure, *National Helium*'s holding that the generalized "public interest" in enforcement of environmental laws suffices to establish standing to sue, if extended to this case, would lead to the conclusion that petitioners—or, for that matter, anyone else—have standing to assert their claims. That holding, however, is plainly not good law in light of subsequent decisions of this Court (see, *e.g.*, *Sierra Club* v. *Morton*, 405 U.S. 727, 734-740 (1972)); petitioners make no claim to the contrary.

Thus, regardless of whether petitioners' claims would have been properly characterized as "founded upon" their federal contracts within the meaning of 28 U.S.C. 1346(a)(2), the district court lacked jurisdiction to the extent those claims "relat[e] to" those contracts. Petitioners' claims of economic injury to existing contractual rights plainly "relat[e] to" their contracts, and thus those claims should have been brought in the Court of Federal Claims.

Moreover, as petitioners concede, "a claim of *breach* of * * * contract (if there existed a viable claim of breach) would fall within the exclusive jurisdiction of the Court of Federal Claims." Pet. 12. Properly viewed, that is precisely the nature of petitioners' claims with respect to their preexisting timber contracts. Petitioners' contracts contain an endangered species provision specifying that "[i]f protection measures prove inadequate, * * * [the] Forest Service may * * * modify this contract to provide additional protection" for an endangered species. Timber Sale Contract provision CT6.25#, *reproduced in* Defendants' Motion to Dismiss, Exhs. 3-5 (filed Feb. 12, 1990). It is undisputed that the Forest Service issued the temporary policy in March 1989 "to provide additional protection" for the RCW as a result of the Forest Service's determination that "protection measures prove[d] inadequate." Thus, petitioners' complaint that adoption of the policy violated certain statutory requirements to the detriment of petitioners' contractual interests amounted to nothing more than a claim that the Forest Service breached its contracts with petitioners by relying on an illegally adopted policy as a basis for contract modification.

The fact that petitioners purported to proceed under the Administrative Procedure Act (APA) rather than a contractual theory is irrelevant. The APA authorizes judicial review of final agency action "for which there is no other adequate remedy in a court." 5 U.S.C. 704. There is no question that petitioners have an adequate alternative remedy for the assertion of their claims of economic injury to their contract rights—namely, the comprehensive remedy provided by the scheme of administrative and judicial review established pursuant to the Contract Disputes Act.[5] Petitioners have failed to demonstrate that that remedy is inadequate, and in any event that narrow question is not itself worthy of review.

3. Petitioners also assert (Pet. 18-22) that the court of appeals erred in rejecting their claims of future economic injury arising out of the temporary policy's alleged effect on future timber contracts. According to petitioners, the court of appeals' ruling on that issue conflicts with decisions by this Court and the courts of appeals. That contention is without merit.

To establish Article III standing, a plaintiff must allege personal injury-in-fact. The requisite injury cannot be "[a]bstract," "hypothetical," or "conjectural," *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974);

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[5] Moreover, because the Contract Disputes Act specifies the Court of Federal Claims as the appropriate court in which to seek judicial review of administrative decisions under the Act, venue was not properly laid in federal district court, and the appropriate form of action was a damages action, not a suit for equitable relief. 5 U.S.C. 703 ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute.").

City of Los Angeles v. *Lyons*, 461 U.S. at 101-102; it must be "distinct and palpable," *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), or "certainly impending," *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 298 (1979). Furthermore, "the litigant must satisfy the 'causation' and 'redressability' prongs of the Art. III minima by showing that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990); see *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

Petitioners' claims of future economic injury rested on the proposition that the challenged Forest Service policy would reduce the quantity of timber available under future timber contracts and thereby cause economic harm to petitioners. Pet. App. 14a-15a. Applying settled principles of law, the court of appeals concluded that those claims were insufficient to confer standing because petitioners had not shown that their alleged injuries were likely to be redressed by a favorable decision. *Id.* at 15a-16a. The court found that it was "purely speculative" whether the relief requested by petitioners "would result in greater timber availability in the future." *Id.* at 15a. Petitioners disagree with the correctness of that determination, but the court's application of settled law to the particular circumstances of this case is not worthy of review.

In any event, the court of appeals correctly held that petitioners' claims of injury relating to future contracts were insufficient to confer standing. Assuming, as petitioners contend (Pet. 8, 18), that the temporary policy adopted in March 1989 reduced the quantity of timber available for harvest in fiscal years

1989 and 1990, a favorable decision now would not redress that result. Any future timber sales would still be subject to the requirements of the ESA and NFMA, and thus would have to comply with the Forest Service's Interim Standards and Guidelines for the management of RCW habitat. In short, there is no basis for concluding that an award of the relief petitioners seek with respect to the temporary policy would have any impact on the future availability of timber in Region 8, and petitioners have therefore not "shown an injury to [themselves] that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

Moreover, the record in this case contains no evidence that the alleged reduction in available timber affected any bid that petitioners did or would have prepared for timber sales contracts during the affected years. Thus, petitioners have failed to "show the existence of any injury * * * of sufficient immediacy and ripeness to warrant judicial intervention." *Warth* v. *Seldin*, 422 U.S. at 516. "Allegations of possible future injury do not satisfy the requirements of Art. III." *Whitmore* v. *Arkansas*, 495 U.S. at 158. Rather, such injury must be "certainly impending." *Ibid.* There is no standing with regard to the possible impacts of the policy on future timber sales to petitioners unless and until the policy "has an actual or immediately threatened effect" on petitioners. *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 894 (1990); see *id.* at 891.

The Ninth Circuit's decision in *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508 (1992), is not to the contrary. In *Mumma*, the court held that the

plaintiff environmental groups had met the prerequisite for standing by showing personal injury-in-fact as a result of a Forest Service decision not to recommend wilderness designation of a number of roadless areas. *Id.* at 1514-1517. Petitioners failed to allege comparable personal injury resulting from issuance of the temporary policy at issue here, because they did not identify in concrete terms any injury they actually suffered or were about to suffer with respect to possible future contracts.[6]

Finally, petitioners' reliance (Pet. 21-22) on this Court's decision in *Northeastern Florida Chapter of Associated General Contractors* v. *City of Jacksonville*, 113 S. Ct. 2297 (1993), is unavailing. That case involved a claim by members of a particular group that they had been denied an opportunity to compete for a government benefit on an equal footing with members of other groups. The Court held that, in such cases, the plaintiffs need not allege that they would have been granted the benefit but for the unequal treatment, because the injury of which the plaintiffs complain is not "the ultimate inability to obtain the benefit," but rather "the denial of equal treatment." 113 S. Ct. at 2303.

In announcing that rule, however, the Court explicitly distinguished the situation of plaintiffs who make no claim of unequal treatment but instead assert that the denial of a particular government benefit is itself the injury that grants them standing. 113 S. Ct. at

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[6] Similarly unavailing is petitioners' reliance (Pet. 21 n.19) on cases permitting review of claims by disappointed bidders on federal contracts. Petitioners are not disappointed bidders; by definition, "future contracts" are contracts that have not been awarded.

2303-2304 (citing *Warth* v. *Seldin*, 422 U.S. 490 (1975)). Petitioners fall into the latter category. The injury of which they complain is not the denial of an opportunity to compete for timber contracts on an equal basis with other timber companies; rather, they claim that they were prospectively injured because the temporary policy reduced the availability of timber for *all* timber companies. Accordingly, the rule announced in *Northeastern Florida Contractors* is inapplicable on its own terms.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1993

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[7] Petitioners' reliance (Pet. 21) on *Ballerina Pen Co.* v. *Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970), cert. dismissed, 401 U.S. 950 (1971), is misplaced for the same reason. In that case, the court of appeals held that entities that supplied ballpoint pens to the federal government had standing to challenge the government's decision to give a ballpoint pen contract bid preference to non-profit agencies for the blind, a category that did not include the plaintiffs. *Id.* at 1205-1206. Thus, the injury that gave rise to standing was the denial of equal treatment; petitioners make no such claim here.

No. 93-418

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SOUTHERN TIMBER PURCHASERS COUNCIL, HANKINS LUMBER COMPANY, INC., HOOD INDUSTRIES, INC. and HUNT PLYWOOD COMPANY, INC.,
Petitioners,

v.

MARVIN C. MEIER, Acting Regional Forester, U.S. Forest Service; JACK WARD THOMAS, Chief, U.S. Forest Service; JAMES W. PULLIAM, Regional Director, U.S. Fish and Wildlife Service; BRUCE BABBITT, Secretary of the Interior,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY BRIEF

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IN THE

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OCTOBER TERM, 1993

No. 93-418

SOUTHERN TIMBER PURCHASERS COUNCIL, HANKINS LUMBER COMPANY, INC., HOOD INDUSTRIES, INC. and HUNT PLYWOOD COMPANY, INC.,

Petitioners,

v.

MARVIN C. MEIER, Acting Regional Forester, U.S. Forest Service; JACK WARD THOMAS, Chief, U.S. Forest Service; JAMES W. PULLIAM, Regional Director, U.S. Fish and Wildlife Service; BRUCE BABBITT, Secretary of the Interior,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONERS' REPLY BRIEF

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1. The court of appeals held that petitioners did not have standing to complain about the Forest Service decision limiting the timber they could harvest under their existing contracts or would be permitted to harvest in the near future. *See* Pet. App. A. That issue was briefed, argued, and addressed by the court below. As demonstrated in the petition, that issue is of substantial importance and is inconsistent with this Court's precedents and the weight of authority from other jurisdictions.

As its lead argument in opposition, the Government urges that "there is no reason for this Court to consider" the standing issue because petitioner's claims are moot—indeed were moot at the time of the district court's 1991 merits opinion (Pet. App. B) and of the Eleventh Circuit's 1993 decision on standing. The Government's theory is that any challenge to the 1989 red-cockaded woodpecker policy ("1989 Policy") is moot because that Policy was superseded in 1990 by another set of woodpecker management guidelines ("1990 Guidelines"). Opp. at 12-16. Thus, the Government apparently would have the decision of the court below escape review—and thus remain in effect to foreclose timber industry participation in suits affecting the amount of timber the Forest Service will allow to be harvested.

There is little merit to the Government's mootness point.[1] The district court twice rejected it, finding that

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[1] The Government would have this Court reject the district court's reasoning on the theory that cases involving short-term orders are "capable of repetition" only if plaintiff shows he will again be subjected to the same substantive order. Opp. at 15-16. This Court has recently rejected the argument that a plaintiff must show that the "selfsame" action will recur. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, —— U.S. ——, 113 S. Ct. 2297, 2301 (1993). A plaintiff need only show a likelihood that he "will again be wronged in a similar way." *Honig v. Doe*, 484 U.S. 305, 323 (1988); *see id.* at 318-22 and n.6.

The district court properly applied the "capable of repetition" exception. The focus of petitioners' claim was the agency's position that before implementing interim policies which alter forest plans, the agency was not required to comply with the National Forest Management Act's procedures for significant plan amendments. The district court correctly found that the use of this procedural shortcut for interim policies, which was the subject of the challenge to the 1989 Policy, was likely to recur; indeed, it had already recurred in the inadequate procedures employed in adopting the 1990 Guidelines. Pet. App. at 58a and 71a. An "interim" order is by nature only temporary, and thus the challenge plainly fell within the exception for legal challenges capable of repetition yet evading review. The district court's determination that the situation was likely to recur has been confirmed by the agency's subsequent

the substitution of a similar policy had not fully eradicated the harmful effects of the 1989 Policy and that the temporary Policy met the exception for short-term orders capable of repetition, yet evading judicial review. Pet. App. at 57a-58a, 70a-71a.

The Government did *not* contest the district court's mootness decision in the court of appeals. The Government did *not* identify it as an issue on appeal or discuss it in its briefs.[2] The Government's decision to abandon the issue in the Eleventh Circuit, only to resurrect it here, suggests either that the Government's asserted confidence in the mootness argument is new-found, or that the Government made a strategic decision not to raise the point in the court of appeals in the hope of obtaining broad ruling from that court on standing or the merits, while holding "mootness" in reserve for an occasion such as this, in an effort to make certiorari less attractive.

The district court's rejection of the mootness argument, and the Government's failure to raise the issue below, may

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issuance of other interim policies without following the procedures required for significant plan amendments. *E.g.*, 58 Fed. Reg. 62910 (Dec. 3, 1993) and 56 Fed. Reg. 28853 (June 25, 1991) (interim guidelines for management of northern goshawk habitat); 58 Fed. Reg. 5353 (Jan. 21, 1993) (interim guidelines for managing California spotted owl habitat); 55 Fed. Reg. 23255 (June 7, 1990) (interim guidelines for managing red-cockaded woodpecker habitat).

The Government chides petitioners for not having sought judicial review of the administrative decision on 1990 Guidelines. Opp. at 10. But such a challenge would be unlikely to succeed so long as the Eleventh Circuit's decision on standing (and the district court's as-yet unreviewed merits decision (Pet. App. B)) remain in effect.

[2] Somewhat misleadingly, the Government blandly asserts that the court of appeals failed to "address" the mootness issue. Opp. at 13 n.1. Although the Government says that it is "informed" that the issue was raised at oral argument, our recollections are to the contrary. If it was raised it was only in passing in response to questions from the court and was not part of any affirmative argument by Government counsel. It was not raised at all by the Government in its briefs.

well bar the Government from presenting it here, at least at this time. Although jurisdictional in part, mootness has been regarded as a prudential doctrine, subject to the exercise of discretion by the Court. *See Franks v. Bowman,* 424 U.S. 747, 756 n.8 (1976) (mootness is not a constitutional doctrine); *Honig v. Doe,* 484 U.S. at 329-32 (Rehnquist, C.J., concurring) (mootness is prudential and not a constitutional, jurisdictional doctrine). Accordingly, the Government's abandonment of the argument below should influence the manner in which the Court approaches mootness at this time. It ought not dissuade the Court from granting the writ.

Despite the Government's contention here that the case is and was moot, the Government and other parties—and indeed the district courts—have not hesitated to rely upon the decision below to deny standing and intervention to members of the timber industry seeking to participate in suits affecting the timber supply from national forests.[3] It is plainly unfair for the Government to tell this Court that the Eleventh Circuit should not have reached standing because the case was moot, and yet to rely on the Eleventh Circuit's standing decision in other forums. *See* Wright, Miller and Cooper, 13A *Federal Practice And Procedure* § 3533.10 at pages 433-35 (1984) (unfair to deny

[3] At least two courts have cited the Eleventh Circuit's opinion in concluding that the timber industry lacks standing to bring claims against federal agencies asserting violations of the Endangered Species Act and the National Forest Management Act. *Forest Conservation Council v. Espy,* —— F. Supp. ——, 1993 WL 441668 at *18 (D. Id. Oct. 28, 1993); *Wind River Multiple-Use Advocates v. Espy,* —— F. Supp. ——, 1993 WL 439727 at *6 (D. Wyo. Oct. 29, 1993). Additionally, in November 1993 filings in three cases, the Government defendants and environmental group plaintiffs cited *Region 8* as supporting their position that timber industry representatives should be denied *intervention* in cases raising Endangered Species Act and timber supply issues. *See* briefs opposing intervention in *Idaho Conservation League v. Caswell,* No. 93-0280-E-HLR (D. Id.); *Greater Yellowstone Coalition v. Robertson,* No. 93-0303-E-HLR (D. Id.); *Sierra Club v. Garber,* No. CV-93-069-BU-RWA (D. Mont.).

certiorari based on a mootness argument). At least where the petition has apparent merit, this Court has declined simply to leave precedent created in such circumstances in place. *See* Stern, Gressman, and Shapiro, *Supreme Court Practice* 287-88, 722-23 (6th ed. 1986). The decision of the court below should not be permitted to stand. It should either be reversed on the standing principles it enunciates or vacated on grounds of mootness.

While petitioners have *not* found a case presenting precisely the same elements as this one—(1) a jurisdictional issue such as standing, which is the subject of the petition; (2) a claim of mootness considered and *rejected* by the district court; and (3) a failure by the Government to assert mootness in the court of appeals—several dispositions are possible:

(a) The Court can decline to address the Government's mootness point, finding it not properly poised for decision at this time, or perhaps waived. The Court may, therefore, grant the Petition and limit its review to the standing issue actually addressed by the court below. It can, of course, do so by granting full consideration with oral argument or by way of summary reversal.[4] If the decision below is reversed (and this Court has not disposed of the mootness argument), the court of appeals may consider mootness and the merits on remand.

This approach commends itself if constitutional standing issues are deemed to be logically prior to mootness issues, or even if standing and mootness are deemed to be jurisdictional issues of approximately equal dignity. There is precedent for this Court considering one jurisdictional issue properly presented for review, while recognizing that a second jurisdictional problem may have to be considered on remand. *See Patsy v. Board of Regents of the State of*

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[4] We, of course, recognize that summary reversal is unusual. However, we believe that we have presented a clear basis for a summary reversal on standing due to the clear conflict between the decision below and *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

Florida, 457 U.S. 496, 515-16 n.19 (opinion of the court directing remand) and 529 (Powell, J., dissenting, because "this Court remands the issue of its own jurisdiction to the courts below") (1982); Stern and Gressman at 288 ("the Court may remand the case to the lower court for consideration of the possibility of mootness"). In the course of a single case, courts frequently have occasion to consider and address, in a series of separate rulings, a number of jurisdictional challenges.

(b) This Court could grant the Petition and consider not only the standing questions presented in the Petition, but also the question of mootness raised by the Government, notwithstanding that the Government did not raise it below.

(c) The Court can grant the Petition, vacate the judgment, and remand to the court of appeals for consideration of the government's mootness argument.[5] Remanding *without* vacating the decision, or otherwise leaving the judgment below intact, would allow the respondent here to profit by having failed to present an argument to the court of appeals that (if it believed it had merit) it should have presented to that court.

2. a. With respect to standing—the subject of the petition—the Government does little to dispute the inconsistency between the decision below and the decisions of this Court and the several circuits cited in the petition. Those cases have allowed government contractors to maintain suit in the district court to set aside unlawful agency action pursuant to the Administrative Procedure Act ("APA"), notwithstanding the possibility of contractual

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[5] If this Court were actually to find the case moot, the proper course would presumably be to vacate the decision of the court below on standing. Even where a case "has become moot while on its way here," it continues to be the "established practice of the Court" to "vacate the judgment below." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *see, e.g., Yellow Freight System, Inc. v. United States*, —— U.S. ——, 113 S. Ct. 31 (1992).

remedies in the Court of Federal Claims. *Compare* Pet. at 11-18 *with* Opp. at 16-20. The Government dismisses the existence of a conflict with those cases by observing that those cases did not focus on "standing."

To be sure, most of those decisions did not inject "standing" into the analysis. This is not surprising because (as described in the Petition) the question is at bottom about the respective jurisdictions of the district courts and the Court of Federal Claims over APA claims. It is not really a question of standing at all. By reaching the merits in each of the cases cited in the Petition at 16-17, these courts implicitly approved plaintiffs' "standing." Those cases and the Court's decision in *Bowen* were improperly decided if the opinion of the court below is correct.

b. The Government (Opp. at 18-19) relies on the Contracts Disputes Act as perhaps distinguishing this case. The Contract Disputes Act was mentioned below only in passing. *See* Pet. App. 13a-14a. It is likely that it was applicable to most of the cases cited in the petition originating after passage of the 1978 Act. Indeed, at least one of the cases cited in the petition, *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1486 (9th Cir. 1985), expressly addressed the Government's Contract Disputes Act theory, applied it to timber contracts, and held that it does *not* bar a timber company from bringing claims in district court "based upon extra-contractual statutory obligations." [6]

The Government theorizes that even though the timber contract appears to give the Government a right to modify

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[6] The Contract Disputes Act requires a contracting party to take certain claims involving the contract to the contracting officer, and then appeal the contracting officer's determinations to either a board of contract appeals or the Court of Federal Claims. *See* 41 U.S.C. §§ 601-12, Pet. App. 137a-47a. The Government does not suggest that Congress wished to channel APA review of statutory and constitutional claims to contracting officers and boards of contract appeals.

the contract to provide additional protection for an endangered species, petitioners' claim, when "properly viewed," was really for breach in that the Forest Service relied on an "illegally adopted policy as the basis for contract modification." Opp. at 19. The Government then argues that an action under this breach of contract theory before the contracting officer and then either the board of contract appeals or Court of Federal Claims would constitute an "adequate alternative remedy" precluding district court review under the APA, 5 U.S.C. § 704.

Not only has the existence of contractual remedies been held irrelevant in the various court of appeals cases cited in the petition, but this Court fully addressed and rejected the Government's § 704 argument in *Bowen v. Massachusetts,* 487 U.S. 879 (1988). This Court held that such an "interpretation of § 704 should be rejected because the [monetary] remedy available in the Claims Court is not the kind of 'special and adequate review procedure' that will oust a district court of its normal jurisdiction under the APA" as only the district court could grant "declaratory or injunctive relief." 487 U.S. at 904-05. *Bowen* is dispositive of this case.

3. Finally, the Government argues that the Eleventh Circuit properly found that the Policy had only a "speculative" effect on the amount of timber that would be made available in the immediate future. Opp. at 20-24. The Eleventh Circuit so declared as an abstract conclusion of law. However, this Court's cases examine speculativeness as a factual matter. Here, the future economic injury was not speculative due to an admitted fact: the Government's Answer conceded that the 1989 Policy reduced the timber available for sale in 1989 and 1990 by 73 million board-feet. Pet. at 8, 19. Since the timber sale level projected in a forest plan is a "statement of intent" (Opp. at 3), it is not speculative to conclude that by adopting the new constraints in the 1989 Policy, the Forest Service reduced

the timber sale level it otherwise intended to offer, to the economic detriment of Council members who would have bid on and purchased this timber.

Where environmental groups are the plaintiffs, courts have frequently found that a forest "plan pre-determines the future" sufficiently to make injuries which depend on future timber sales not too speculative to confer standing to contest a forest plan. *See Resources Limited, Inc. v. Robertson*, —— F.3d ——, 1993 WL 442034 at *2 (9th Cir. Nov. 3, 1993) (describing three comparable cases where the Ninth Circuit found standing).[7] The conflict with the Ninth Circuit cases as respects this statutory scheme is clear, as is the broader conflict with other courts considering similar issues. Equally clear is the Eleventh Circuit's error in postulating speculativeness as a matter of law, rather than relying on the admitted fact that the unlawful policy reduced the amount of timber for harvest.

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[7] The Government's argument (Opp. at 22) that the injury to the then-future timber supply is no longer redressable because 1989 and 1990 have passed, would preclude standing in any case where the short-term order has lapsed. Yet, courts frequently reach the merits in short-term order cases. *See Honig*, 484 U.S. at 329-32 (Rehnquist, C.J., concurring); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). The Council's interest that the future timber supply not be reduced without following the procedures required by the National Forest Management Act and other law can still be redressed by a declaratory order specifying the agency's obligations under that Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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